83-1218

No.

IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM DI BUONO, ASSIGNMENT JUDGE, et. al.
Petitioners

v.

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated,
Cross-Petitioners,

v.

WILLIAM H. FAUVER, COMMISSIONER, DEPARTMENT OF CORRECTIONS, STATE OF NEW JERSEY, and his successor in his official capacity,
Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

T. GARY MITCHELL,
Director, Office of
Inmate Advocacy

SUSAN L. FERGUSON,
Asst. Deputy Public
Defender on the
Cross-Petition

*Counsel of Record

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE - DEFENDER

THOMAS SMITH*
First Asst. Public Defender

Department of the
Public Advocate
Richard J. Hughes
Justice complex
CN 850
Trenton, NJ 08625
(609) 292-1775

The Copy Center, Inc., 615 Chestnut Street, Philadelphia, Pennsylvania 19106, 215-928-1900

QUESTIONS PRESENTED

1. Whether the Court of Appeals' decision, which imposes conditions of severe overcrowding on pretrial detainees at an antiquated county jail and undermines the ability of jail administrators to preserve institutional security, is in direct conflict with the Due Process analysis mandated by Bell v. Wolfish, 441 U.S. 520 (1979), and followed by every other Circuit in the country?

2. Whether the Court of Appeals' decision, which imposes conditions of severe overcrowding on convicted prisoners at an antiquated county jail and undermines the ability of jail administrators to preserve institutional security, is in direct conflict with the Eighth Amendment analysis mandated by Rhodes v. Chapman, 452 U.S. 337 (1981), and followed by every other Circuit in the country?

3. Whether the Court of Appeals' de novo review of the carefully considered factual findings of the District Court is wholly inconsistent with the proper scope of review, as set forth in Bell v. Wolfish, 441 U.S. 520 (1979) and Rhodes v. Chapman, 452 U.S. 337 (1981), of claims of unconstitutional jail conditions?

---

* PARTIES*

The petitioners in this action include Randolph Pisane, Director, Union County Department of Public Safety; Louis J. Coletti, Union County Deputy County Manager; Arthur Grisi, Union County Manager; and Charlotte DeFilippo, Chairman, Union County Board of Chosen Freeholders; as successors in office to the named defendants, Ralph Froelich, Union County Sheriff; James Scanlon, Jail Administrator; Thomas Jefferson, Jail Warden; and Rose Marie Sinnot, Chairman, Union County Board of Chosen Freeholders; in the courts below.

V. William DiBuono, Assignment Judge; Joseph G. Barbieri, Criminal Assignment Judge; and Cuddie E. Davidson, Bail Judge; as Representatives of the Criminal Courts, Union County, were dismissed as defendants.

The cross-petitioners in this matter are Timmie Lee Barlow, Elbert Evans, Jr., Raymond Skinner, and James Wysocki, the named plaintiffs in the courts below for a class of all inmates at the Union County Jail, Elizabeth, New Jersey.

The respondent is William H. Fauver, Commissioner, New Jersey Department of Corrections.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

OPINIONS BELOW

The panel opinion of the Court of Appeals (App. D) is reported at 713 F.2d 984 (3rd Cir. 1983). The order denying rehearing (App. A) and the dissent from denial of rehearing in banc (App. B) are reported at 718 F.2d 1247 (3rd Cir. 1983). The District Court opinion (App. F) is reported at 537 F.Supp. 993 (D.N.J. 1982).

JURISDICTION

Judgment of the Court of Appeals was entered on August 11, 1983. A timely petition for rehearing in banc was denied (6-4) on October 5, 1983, with four judges dissenting and voting for rehearing. Time to file the instant petition was extended to January 18, 1984, by an Order of Justice Brennan. (A139)[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

---

[1] Designations used in this petition are:
A - Appendix to the Cross Petition;
JA - The Joint Appendix below;
SA - Supplemental Appendix of Appellees below.
Decisions below are also cited to the appendix.

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved are the Due Process Clause of the Fourteenth Amendment to the Constitution which, in part, provides: "nor shall any State deprive any person of...liberty...without due process of law," and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution which, in part, provides: "nor [shall] cruel and unusual punishments be inflicted."

STATEMENT OF THE CASE

Introduction

This case is before the Court in a unique and unprecedented posture. First, petitioners include both the inmates and the administrators of the Union County Jail in Elizabeth, New Jersey.[2] Both peti-

---

[2] The inmates are represented by the New Jersey Department of the Public Advocate, a cabinet level department in the New Jersey state government. The jail's administrators and County Freeholders are represented by County Counsel of Union County.

tioners seek review of a Third Circuit panel decision imposing double bunking at an antiquated, severely overcrowded jail against the considered judgment of the jail's administrators, documented below, that this practice would imperil institutional security, exceed any reasonable limits of the physical plant, and endanger the safety and health of inmates and jail personnel alike.

Second, the constitutional straightjacket applied on the local jail authorities by the Court of Appeals panel compels these officials, in contravention of their sound judgment, to impose conditions upon the jail population that are more severe than those that have been tolerated in any other jail facility in the United States.

Third, in accomplishing a result that conflicts with the constitutionally protected rights of the inmates and the ability of jail officials to operate their institution,

the panel converted the flexible and balanced calculus employed in Bell v. Wolfish, 441 U.S. 520 (1979) and Rhodes v. Chapman, 452 U.S. 337 (1981) into a rigid and mechanical approach that does not serve either the inmates or their custodians and that threatens to remove the protection of the federal Constitution from this country's jails.

Fourth, the panel's legal analysis is fundamentally flawed by its disregard of factual findings that had been drafted by a Special Master who carefully considered a wealth of evidence from inmates and officials. Instead, the panel conducted a de novo review of the record and, without making any determination that the findings of both the Special Master and District Court were clearly erroneous, ignored the uncontroverted evidence that the double bunking and overcrowding required by its decision would work a severe hardship on

both inmates and the administrators at the Union County Jail.

Background

The Union County Jail (UCJ), located in the heart of Elizabeth, New Jersey, is an antiquated, eight-story facility, which was converted from a court house building to a jail in 1925. (JA10a). The jail's 19 cellblocks, with 218 cells, are where inmates spend virtually each day and hour of their confinement. (JA67a) The overwhelming majority of jail inmates are presumptively innocent detainees or persons convicted of shoplifting, driving on the revoked list, non-support, or minor property offenses. (JA269a-271a)

Each of the jail's cellblocks consists of a narrow corridor with clanging steel gates and a row of small, windowless metal cells. From 10 p.m. to 6 a.m. inmates are restricted entirely to these 39 square foot cells. Id. The cellblock corridor is

the sole area in which inmates may move freely at other times. Yet, as found by the Special Master, "even at normal population levels," the cell corridors "are cramped, overcrowded and would allow little opportunity for free movement or exercise."(JA84)

The narrow cellblocks in this decaying jail offer a dungeon-like spectacle, stripped of even the simplest amenities. There are no lights in either the cells or the cell corridor. The only illumination reaching these areas must filter through the floor-to-ceiling wrought iron bars from dim lights in an officers' walkway that runs parallel to the cellblock. (JA68a) The cellblocks are without any chairs or any tables. The 5½ foot wide corridor is constantly crowded with as many as 34 inmates at any one time moving in and out of the 17 cells for momentary relief from the cramped cells, to get a shower or to peer through the floor-to-ceiling wrought

iron bars for a glimpse of the television on the other side.(JA67a-68a, 84a)

The cells have only one piece of furniture -- a metal bunk attached to one wall, which is topped with a thin mattress; the bunk abuts a combination steel sink/toilet, the toilet bowl of which is always open and uncovered. (JA67a) The cells lack any hot water, and, when the jail has been overcrowded even cold water was lacking. (JA457a, 465a, 469a, 483a), The cell is not simply a place to sleep, for its metal bunk and toilet are the only places during the entire day where an inmate may sit on something other than the jail's cold and hard cement floor.

The jail has no general areas where meals can be served to the inmates. Therefore, all inmates must eat every meal on their laps while sitting on a bunk, an uncovered toilet, the cement floor, or while standing. The single shower at the

end of each cellblock has provided inmates with little more than a trickle of water in which to bathe during periods of overcrowding, due to the weak water pressure produced at these times by the antiquated jail's limited physical plant.(JA465a) With the overpopulation of the cellblocks, these showers were rarely maintained and water readily built up on the floors because there are no floor drains in the housing areas; as a consequence, inmates have suffered serious injuries from slipping and falling in the overutilized and unmaintained showers. (JA454a, 457a, 465a, 556a)

Toilets in the cells, when used by more inmates than the plumbing capacity is designed for, back up regularly, leaving cells filthy, with feces and urine all over the floor; this unhealthy condition would last for considerable periods of time, because inmates were not regularly provided materials for cleaning. (JA483a).

Since shoes are not issued by the jail, inmates often had to walk around barefoot in the cells and cellblocks. (JA453a) Clothing might not be cleaned for as long as once every two or three months (JA453a, 457a, 470a), and often the cleaning was inadequate to remove severe odors or dirt from the clothes. (JA476a).

It is in this harsh, decrepit environment that inmates must spend the overwhelming majority of their waking hours. (JA67a) For inmates at this traditional lock-up, there really is no respite from the teeming, crowded and depressing existence on the cellblocks. Both an unconvicted pretrial detainee and a person convicted of a minor offense, must try to read in the cramped, unlighted restroom-type stalls that constitute the cells; the person must go the bathroom under the gaze of numerous other individuals and must occupy a space that is physically inadequate to provide the

security and facilities for twice the number of inmates that it was intended to confine. The record is replete with the severe safety, health, and institutional crises which have resulted from this severe overcrowding. E.g. A129-134.

Even if an inmate were permitted to leave the cellblock, there is simply no place in the jail to find refuge from the pressures and hazards of the cellblock crowding. There are no dayrooms or all-purpose rooms. There are no classrooms. There is no outside yard.[3]

The desperate conditions at UCJ are the product of a state practice adopted in early 1981 of retaining great numbers of prisoners in locally operated county jails. This practice is now a national

---

[3] One small room, at times, functioned as a chapel and contained some law books (thus, serving also as the jail's law library). Access to these areas had been curtailed by overcrowding. (JA76a) Two small rooms used as exercise areas had been converted to dorms. See note 11 infra. (JA68a)

phenomenon,[4] and has resulted in jail inmates, who have not been convicted of crimes or have been convicted only of minor offenses, generally living under harsher conditions than felons convicted of serious crimes and incarcerated in state prisons.[5]

Cross-petitioners, UCJ inmates, instituted this class action lawsuit to challenge the constitutionality of overcrowded conditions at the jail. (JA5a) County officials then filed a third-party complaint against the state Corrections Commissioner (hereafter "Commissioner"), alleging that

---

[4] Overcrowding Spreads to Local Jails in U.S., N.Y.Times, Nov. 23, 1983, at A1, col. 2, A24, col. 1. Citing a recent Justice Department survey, the Times reported "state prison officials are increasingly attempting to put their overflow in county jails," resulting in "worsening problems for county sheriffs and jail officials" and leading to "jammed, makeshift jails." Id. In 1982, "17 states had a combined total of 8,217 state prisoners housed in local jails," and "[a]mong the worst cases...were New Jersey, with 1584 state prisoners in local jails; Alabama, with 1286, and Louisana, with 1499." Id. at A24, col. 1 (emphasis added).

[5] Id. at A24, col. 2.

his refusal to accept custody of state prisoners from the county jail created "an intolerable situation for all." (JA20a).

On October 22, 1981, the district court approved a consent agreement between the county and the inmates stipulating a maximum population capacity for the jail of 238 -- the level which the parties agreed was necessary to preserve the health and safety of the inmates, and manage the jail properly --and a procedure to be followed in the event the population exceeded 238.[6] (JA486a) See 537 F.Supp. at 997 n.11 (A81-82 n.11). Simultaneously, the county sought a preliminary injunction compelling the Commissioner to accept custody of all

---

[6] The state Corrections Commissioner had conceded shortly before the commencement of this litigation that the jail had a maximum capacity of only 238 inmates, see 537 F.Supp. at 1011 (A111), which according to the Commissioner represented "the maximum number of prisoners which may be safely housed in that facility." Letter from William H. Fauver to Judge DiBuono, dated February 20, 1981. (JA585a) (emphasis added).

state prisoners in the jail[7]. (JA28a) The Commissioner then challenged the consent agreement.

In order to undertake a thorough examination of conditions at the jail prior

---

[7] In support of this motion county officials submitted uncontroverted affidavits attributing a September 1981 riot, in which 6 corrections officers were held hostage at gunpoint, to a breach in security caused by overcrowding. (SA2pa) (A129). The overall administrative head of the jail, also attributed "a series of attempted suicides and two actual deaths" to the overcrowding, explaining:

> The mood at the County Jail is tense and unless we can receive immediate relief in the form of a substantial reduction in inmate population...I truly fear additional incidents at the jail which could prove more violent or damaging than those already suffered.

(SA3pa) (A129). Similarly, the County's Coordinator of Correctional Services cautioned:

> [T]he situation at the Union County Jail continues to be volatile, highly charged and, unless emergent action is taken to remove all state prison inmates to reduce our population to at or below our rated capacity, the very real possibility of another riot continues to exist. The present mood at the jail is a combination of hostility and fear -- hostility by the inmates because of the overcrowding, ...and fear on the part of both inmates and County employees and administrators because of the very real potential of another uprising.

(SA8pa) (A133).

to considering any changes in the consent decree or ruling on the county's motion, the district judge appointed the Honorable Worrall F. Mountain as Special Master pursuant to Fed. R. Civ. P. 53.[8] 537 F.Supp. at 998 & n.14 (A83). After conducting an extensive investigation, the Special Master rendered a report on March 1, 1982, which contained both detailed findings of fact and proposed conclusions of law.

The Master found that the jail was severely overcrowded. (JA69a-75a). High population levels caused principally by the presence of state prisoners had forced the jail's administrators to put two people

---

[8] As a recently retired Associate Justice of the New Jersey Supreme Court, and a member of a recent Governor's Task Force on Prison Overcrowding, Justice Mountain was "particularly well-qualified" for assessing permissible conditions of confinement and the needs of the local jail administrators. 718 F.2d at 1249 n.5 (dissenting opinion) (A4 n.5). Similarly, the district judge also was "particularly knowledgeable about the conditions of the Union County Jail," having served many years as a Judge of the New Jersey Superior Court in Union County. Id.

in many of the jail's tiny cells for extended periods of time.[9] Close to 90 percent of these double-celled inmates were pretrial detainees.[10]

The Special Master found that, as a result of overpopulation each inmate had to be confined to a paltry amount of living space. (JA71a-73a, see also 203a-205a). In addition, the "severe overcrowding conditions" in the jail had adversely affected numerous other aspects of inmates' lives. (JA74a, 75a) In particular, the Special Master found that there was no "realistic opportunity" for inmates to obtain regular

---

[9] Double celling was accomplished by the placement of a second mattress in each cell on the floor next to the urinal, thereby consuming virtually all of the 17 square feet of floor space that would otherwise be unoccupied. 537 F.Supp. at 999-1000 (A85-86); 718 F.2d at 1252 (dissenting opinion) (A11-12); JA70a.

[10] Of the jail's population, 57% regularly were pretrial detainees; yet they accounted for 142 of the 162 inmates being double celled in general population cells on an average day. 537 F.Supp. at 999 (A85); JA70a n.6.

physical exercise and recreation.[11] (JA75a) This was "particularly disturbing" to the Master "in view of the conditions of inmate confinement in the cell corridors." (JA75a); see 537 F.Supp. at 1006 (A87-88). As the Master starkly noted, the cellblocks "where the inmates spend the overwhelming majority of their waking hours are cramped, overcrowded and would allow little opportunity for free movement or exercise even at normal population levels." (JA84a) (emphasis added).

As a result of overcrowding, jail officials were unable to provide inmates with clean clothing and linen. Some inmates were required to wear the same clothes for several weeks. (JA76a) The availability of worship in the chapel and access to

---

[11] Women had no recreation opportunity as their exercise area was converted to a dorm. (JA68a,75a) Time for exercise by male inmates was reduced to one hour periods, only twice per week. Id. See 537 F.Supp. at 1006 (A87-88).

the law library were delayed or curtailed. (JA76a) Incoming inmates could not be screened for infectious disease and subjected the entire population to a serious health risk. Visitation was sharply reduced to 5-10 minute visits, three times a week, virtually eliminating a vital source of contact that the mostly unconvicted detainees had with the outside world. (JA75a-76a)

The Master further found that the overcrowding situation had unquestionably resulted in an increase in scattered instances of inmate fighting, including a recent stabbing, and that "an extremely volatile situation" would be posed if overcrowding continued into summer. (JA77a) In making his findings, the Special Master repeatedly deferred to the expertise of the jail's actual administrators and relied on other uncontroverted facts in the record.[12]

---

[12] The record established that overcrowding fostered increased violence, tension, hostility and [FOOTNOTE CONTINUED ON FOLLOWING PAGE]

In his proposed conclusions of law, the Master found that "the totality of the overcrowding conditions at the jail . . . amount[ed] to 'genuine privations and hardship' which [could not] be justified by the mere fact that a statewide prison overcrowding problem exist[ed]." (JA82a) Recognizing the interrelationship between the jailhouse population and the ability

[FOOTNOTE CONTINUED FROM PRECEDING PAGE]

fights among inmates and assaults by inmates upon each other and guards. (JA77a, 458a, 465a)(SA2pa-8pa)(A129-34). Security for UCJ inmates and staff had been jeopardized. (SA2pa-8pa)(A129-34). Crowding prevented effective classification by precluding the separation of detainees from county and state prisoners, and severely interfering with the ability of jail officers to separate inmates because of the inmates' medical conditions or dangerousness. (JA77a, SA2pa-8pa)(A129-34) Long delays were encountered in the receipt of intake medical examinations and requested medical services. (JA465a, 470a) Moreover, the overcrowded conditions at the jail had not only demonstrated the potential danger of serious harm to life and property (JA78a), but these dangers had already been realized in the riot, suicides and damage to property in disturbances. (SA2pa-8pa)(A129-34) Overpopulation and crowded conditions at the UCJ transformed a short-term detention facility intended primarily to house unconvicted detainees into what even county officials characterized as a "powderkeg" (SA32a), that could easily ignite from the widespread tension, fear, and anxiety. (SA3pa, 6pa).

to meet minimal constitutional requirements, the Master made the further specific finding that the maximum capacity of the jail is 244 persons,[13] which was the population at which he found it could "meet the basic human needs of the inmate population." (JA90a-91a)

All parties were given the opportunity to object to the Master's findings, but no objections were ever raised to the Master's findings of fact.[14] Subsequently, the Commissioner, for the first time, raised the issue of double bunking,[15] contending that the installation of a second bunk in each cell would cure all conditions con-

---

[13] After 15 new intake cells were completed (which has now occurred), the maximum capacity of the jail would be 259 persons. (JA91a-92a)

[14] 537 F.Supp. at 1001 (A89). The Commissioner contested only the suggested remedy: requiring the state to remove its prisoners from the jail. (JA110a, 149a-150a); see 718 F.2d at 1254 (dissent)(A16).

[15] The Master never reached the issue of double bunking, noting: "None of the parties has testified, or otherwise suggested, that it would be feasible to equip the 39 square foot general population cells at the UCJ with two beds....[T]hat question was not raised in the record before me."(JA90a n.19).

demned by the Master despite the unprecedented rise in population to as many as 494 inmates which the practice would produce. (JA110a, 149a-150a) See 718 F.2d at 1258 (A24). Briefs were filed on the issue, but no additional factfinding was done. The county jail administrators and the inmates strenuously opposed double bunking as an illusory and destructive "remedy" under the particular circumstances present in the UCJ's general population cellblocks.

The district court reviewed the Master's findings of fact in accordance with the standard specified in Fed.R.Civ.P. 53(e)(2) and concluded that none of these findings was clearly erroneous. 537 F.Supp. at 1001 (A89). It then carefully applied the analysis in Bell v. Wolfish, 441 U.S. 520 (1979), relying on the Court's admonition that:

> [c]onfining a given number of people in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment....

537 F.Supp. at 1003, 1007 (citing 441 U.S. at 542)(A93, 102). The court emphasized that the UCJ differs markedly from the MCC facility at issue in Bell. Indeed, the court noted that double celling at the UCJ would be equivalent to quadruple celling in Bell. Moreover, unlike the MCC facility, there is no respite at all from the adverse effects of overcrowding at the UCJ. Id. at 1003-1005 (A93-99). Like the Special Master, the District Court accorded considerable deference in its analysis to the expertise of the jail's administrators.

With respect to convicted inmates, the lower court applied this Court's analysis in Rhodes v. Chapman, 452 U.S. 337 (1981). The court noted that even though double bunking would have the salutary effect of getting inmates off of mattresses on the floor, the stark reality of the UCJ was that the overpopulation, and not simply the sleeping arrangements, had forced

the jail's administrators to deny inmates basic services. In applying Rhodes, the district court followed the Court's directions and looked to "objective factors...to the maximum extent possible." 452 U.S. at 346.[16]

Based on the Master's findings and this Court's decisions in Bell and Rhodes, the district court concluded that it was necessary to limit the jail's population to 259 people in order to remedy the unsafe, unhealthy and inhumane conditions caused by overcrowding.[17] 537 F.Supp. at 1011 (A111). To reduce the population, the court ordered that the state begin to accept

---

[16] The factors included were: (1) the expertise of the jail's actual administrators, 537 F.Supp. at 1011 (A110-11), (2) the effect overcrowding had on the jail's physical plant and programs, (3) state regulations fixing standards for county jails, id. at 1005 (A98), and (4) the fact that approximately 88% of all local jails nationwide meet or exceed the space considerations of his decision. Id. at 1005 n.18 (A99 n.18). See notes 35-38 supra.

[17] This figure was consistent with the UCJ administrators' views of the maximum number of individuals that could be safely and securely housed at the jail, (A136-37) (JA487a), as well as, with the maximum capacity only recently suggested by the Commissioner. 537 F.Supp. at 1011 (A111); see note 6 supra.

custody of its prisoners in accordance with procedures set forth in a state statute.[18]

The Commissioner appealed the decision to the Third Circuit. A panel of the Court of Appeals "substantially reversed all of the relief ordered by the district court," and essentially removed all limits on overcrowding at the UCJ. 718 F.2d at 1248, 1258 (dissenting opinion)(A3, 24). The panel's analysis dealt with isolated jail conditions, rather than the totality of conditions considered by the Special Master and the District Court. Focusing solely on the propriety of double bunking, 713 F.2d at 994 (A51-52), the panel ignored the considered judgments of the jail's administrators and required the district court to vacate any restrictions on double bunking and limits on the jail's population. The panel

---

[18] See N.J.S.A. 2C:43-10(e). The County's compliance with the order requiring regular recreation and visitation programs, and other basic services, was expressly conditioned on a reduced population. (JA487a) 537 F.Supp. at 1011 (A110-11).

also rejected the requirement for removal of state prisoners. 713 F.2d at 1003 (A69-70).

On application for rehearing in banc, four members of the Court of Appeals voted for rehearing in banc.[19] In their dissenting opinion, three judges criticized the panel for (1) applying "bits and pieces of language" from Bell "in a manner the Supreme Court never intended," id. at 1259 (A28); (2) relying on Bell to support propositions for which Bell's analysis "lends no support," id.(A27-28); (3) undertaking its own de novo review of the facts and "freely substituting its own factfinding for that of the Master", id. at 1258, 1259 (A25-28); and (4) failing to accord appropriate deference to the trial court in fashioning relief. Id. at 1248 (A4).

The dissent noted that the conditions

---

[19] Judges Gibbons, Higginbotham, Sloviter, and Weis dissented from denial of rehearing. Judge Weis joined only in the vote and not the opinion. 718 F.2d at 1247, 1248 (A1-2, A29-30).

condoned by the panel were "more severe than any that have been tolerated in any other locality of the United States," 718 F.2d at 1248 & n.3 (A3), and that the standards announced by the panel "considering that we are dealing with the treatment of human beings, compare unfavorably with the standards mandated by federal law for the treatment of animals." 718 F.2d at 1248 & n.4(A3-4).

Inmates and the County applied for a stay pending the filing of a petition for certiorari, which was granted through November 30, 1983.[20] In supporting papers,[21] jail officials again described severe management, security, and medical problems that would result from a population increase such as the panel had ordered.

---

[20] The stay was to continue if a petition for certiorari was filed by that date. On November 28, 1983, County officials filed their petition.

[21] See Affidavit of Robert Vasquez, Director of the Division of Correctional Services, Department of Public Safety, Union County. A123.

ARGUMENT

I

THE COURT OF APPEALS DECISION, WHICH MANDATES DOUBLE BUNKING OF PRETRIAL DETAINEES AND SEVERE OVERCROWDING IN AN ANTIQUATED LOCAL JAIL AGAINST THE CONSIDERED JUDGMENTS OF JAIL ADMINISTRATORS THAT SUCH CONDITIONS WOULD JEOPARDIZE INSTITUTIONAL DISCIPLINE AND SECURITY, CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENTS ESTABLISHED IN EVERY OTHER CIRCUIT AND FUNDAMENTALLY DISTORTS THE ANALYSIS REQUIRED BY BELL v. WOLFISH, 441 U.S. 520 (1979) IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The decision of the Court of Appeals' panel should be reviewed by this Court for four reasons. First, the panel's decision involves a question that was left open in Bell v. Wolfish, 441 U.S. 520, 543 n.27 (1979) -- the appropriate analysis of extreme overcrowding and the unconstitutional confinement of pretrial detainees at antiquated local jails. Second, the panel virtually removes the protections of the federal Constitution from jail facilities in this country by seriously eroding the careful accommodation of interests

which the Court established in Bell v. Wolfish. Rather than balancing a detainee's retained liberty with the needs of jail officials to maintain institutional security, as the Court required in Bell, the panel has utilized a framework of analysis that jeopardizes the interests of both inmates and jail officials. Third, the panel's decision is in conflict with the requirements established by every other Circuit construing Bell. As a result, the panel has mandated double bunking in conditions more severe than those tolerated anywhere else in the country. Fourth, the panel decision fundamentally misconceives the role and responsibility of federal courts in addressing the national problem of severely overcrowded conditions of confinement for pretrial detainees in local jails.

A. The Present Case Involves a Question Left Open in Bell v. Wolfish

In Bell, the Court left open the question raised here regarding the minimum requirements

for conditions of pretrial detention in "traditional" jails. See 441 U.S. at 543 n.27. As the Special Master's findings of fact demonstrate, the antiquated Union County Jail is that archetypal "traditional jail" to which Bell referred. The "familiar image" of "barred cells, dank, colorless corridors or clanging steel gates," id. at 523, permeates the Master's findings. Moreover, the UCJ is a jail where severe institution-wide overcrowding has led to an inability to deliver minimal basic services and maintain institutional security. This jail is clearly among the facilities which this Court characterized as "markedly different" from the modern jail in Bell, id. at 543 n.27.[22]

The due process analysis in Bell is derived from a consideration of the conditions

---

[22] This Court observed that the facility in Bell "represented the architectural embodiment of the best and most progressive penological planning." 441 U.S. at 525.

of pretrial confinement in their totality at the particular facility. Accordingly, the Court's inquiry in Bell focused on the fact that double-bunked inmates at the MCC could enjoy extensive freedom of movement between their "rooms" and spacious, well-equipped common areas. Id. at 541, 543.[23] The ability of inmates to move freely in such facilities for as much as 19 hours a day mitigated the "admittedly rather small sleeping space" which the jail's 75 square foot rooms provided. Id. Consistent with this particularized analysis of the interrelationship of living conditions at the jail, the Court's holding

---

[23] For each housing unit at the MCC, the common areas included a multi-purpose room, a balcony education area and a recreation room, which together were equipped with couches, chairs, tables, exercise apparatus, typewriters, laundry facilities, a water fountain, and pantries with microwave ovens. The exercise apparatus in each common area included weight machines, exercise bicycles, dip bars, jogging machines, wall pulleys and medicine balls. See Wolfish v. Levi, 439 F.Supp. 114, 120-21, 128 (S.D.N.Y.), aff'd 573 F.2d 118, 122 (2d Cir. 1978), rev'd sub. nom. Bell v. Wolfish, supra.

upheld double bunking only "as practiced at the MCC." Id. at 541 (emphasis added).

The Court did not discuss, and indeed reserved decision on, the appropriate considerations that should enter into an analysis of overcrowding and double bunking in "traditional" jails. Id. at 543 n.27. The Court, however, explicitly indicated that such a jail would present a different set of factors for proper assessment of pretrial detainees' claims under the Fourteenth Amendment. Id. The present case squarely presents the need for resolution of the important question left open in Bell. In contrast to the MCC, inmates at the UCJ are held in severely crowded cellblocks from which there is virtually no respite, and where the cells, only half the size of the "rooms" in Bell, must be used for much more than sleeping space. Moreover, the excessive population has overtaxed the jail's physical plant, exhausted its limited facilities,

curtailed basic services, heightened tensions and hostility between inmates and jail personnel, and led to an increase in violent incidents. The severe overcrowding, and the totality of the above conditions, were found by the Master to be pushing the jail as an institution to a breaking point.

The panel's decision mandating double bunking would result in an unprecedented further increase in the jail's population far beyond even that which the antiquated facility had ever previously experienced, thereby exacerbating the severe overcrowding from which inmates and their jailers had sought relief. Thus, this case presents compelling reasons for the Court to determine how the methodology of Bell should be applied to a "traditional" jail.

B. The Panel's Decision is in Fundamental Conflict with Bell v. Wolfish

The manner in which the Third Circuit proceeded to answer the question left open in Bell drastically distorts the due process

analysis mandated by this Court. Indeed, the decision threatens to leave even the most debilitating jail conditions virtually immune from any judicial review under the federal constitution. Specifically, the panel decision (1) misconceives the Court's holding in Bell that double bunking is not unconstitutional per se, by essentially holding double bunking is per se constitutional in all circumstances, and (2) imposes double bunking over the strenuous and well-considered objections of the jail's administrators. In so doing, the panel ignored the considered judgments of the administrators of the UCJ that continued overcrowding and double bunking would jeopardize institutional security and endanger the jail's ability to function.

First, in direct conflict with Bell, the panel isolated specific factors (e.g., adequate living space and double bunking) from its consideration of the totality of

the circumstances at the jail. The panel then utilized a mechanistic approach in considering these issues, rejecting any minimum requirement for living space in the antiquated jail -- even one agreed upon by inmates and jail officials, and substantially below the requirements of state corrections regulations -- as a "quantitative" factor not deserving serious analysis. See 713 F.2d at 996 (A55). This approach is wholly at odds with the inquiry into the totality of conditions mandated by Bell.[24]

In sharp contrast, the Court's analysis in Bell carefully examined living space

---

[24] The panel isolated "the practice of placing a mattress on the floor for the second occupant of a cell" as "indeed the only condition not meeting constitutional standards," 713 F.2d at 994(A51-52), rather than considering the Master's findings which were replete with references to the deleterious impact of overcrowding on inmates and jail operations. In this manner, the panel misconceived the issues before it and erroneously assumed that resolution of the "the two-in-a-cell or double bunking practice" would "determine the outcome of this appeal." 713 F.2d at 994(A52).

as part of the totality inquiry. See 441 U.S at 542. This analysis was carefully followed by the Master and district court, who examined space considerations as part of the totality. For example, they reviewed the uses demanded of the particular environment, the activities which areas may permit, and the time spent in the area, just as the Court did in Bell. See 441 U.S. at 543. Cf. Rhodes v. Chapman, supra, 452 U.S. at 366 nn.13 & 14 (Brennan, J., concurring) (restrictive living space requirements are mitigated by prisoners' freedom to spend time away from their living units).

Only after consideration of all these factors did the Special Master and District Court reach its conclusion that the conditions at the UCJ were unconstitutional. In short, the panel's failure to inquire into the interrelationship between overpopulation and the uncontroverted serious deficiencies in conditions led it to ignore the factors

that compelled the Master and the district court to find that satisfaction of the "basic human needs" of the jail's pretrial detainees required a limit on the jail's population. (JA90a)[25] Yet, the precise inquiry that the panel failed to make is the very one that this Court in Bell considered essential to proper consideration of the important interests of pretrial detainees in the due process calculus.

Second, the panel's fragmentation of the Bell analysis also prevented the Court of Appeals from accommodating the interests of local jail administrators. Specifically, because of a parsed consideration of the relevant factors, the panel failed to recog-

---

[25] In no less than 11 areas, the Master's findings referred to the adverse impact of overcrowding. (JA74-78a)

The panel's decision also improperly isolated duration of confinement from an analysis of the specific conditions existing at the UCJ, 713 F.2d at 996-97 n.18, contrary to the Court's teaching. See Hutto v. Finney, 437 U.S. 678, 686 (1978), cited in Bell, 441 U.S. at 543. In doing so, the panel also completely disregarded the findings of the Master and district court. See 718 F.2d at 1259.

nize and accord deference to the expertise and judgment of the jail's administrators that double bunking and continued overpopulation jeopardized internal order and institutional security at the jail.

The panel's neglect of this critical aspect of the due process inquiry has particular significance here, where from the onset of this case to the filing of their petition for certiorari, the officials responsible for the daily operation of the UCJ have contended that overcrowding and double bunking seriously jeopardize internal order, discipline and institutional security, and endanger the health, safety and well-being of inmates.[26]

Indeed, in conflict with the Court's directives in Bell, the panel substituted its judgment for that of jail officials, whose opinions had been accorded considerable deference by the Special Master and the

---

[26] See notes 7 and 12 supra, and text accompanying note 21 supra.

District Court. Ignoring the concerns of the local administrators, the panel then embarked on an unprecedented analysis of the conditions of confinement that directly contradicts the opinions of "the persons who are actually charged with and trained in the running of the particular institution under examination." Bell v. Wolfish, 441 U.S. at 562 (emphasis added).[27] As a consequence, the panel decision virtually assures that the jail will not only continue to be an "overcrowded and understaffed" institution, see Youngberg v. Romeo, supra, but also that it will be forced to operate

---

[27] Deference is not only a principle to abide, but "necessary to enable institutions of this type -- often, unfortunately, overcrowded and understaffed -- to continue to function." Youngberg v. Romeo, 102 S.Ct. 2452, 2463 (1982). As in Bell, jail officials here "must be free to take appropriate action to ensure the safety of inmates and corrections personnel...." 441 U.S. at 547. Thus, the jail's

> administrators...should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Id. (emphasis added).

in a manner that the administrators charged with its operation have concluded will threaten the jail's ability to function.

As is evident from the above discussion, the fundamental issue that is material to the balancing of interests required by Bell is whether deference has been properly accorded the "expert judgment" of those charged with the "interest in maintaining security and order and operating the institution in a manageable fashion." 441 U.S. at 541 n.23.[28] This interest, which here is lodged undoubtedly in the county jail's administrators, see 713 F.2d at 993 (A48-49), is an important -- indeed, indispensable -- consideration in due process analysis.

---

[28] The panel utterly failed to subject the judgments of County officials to any genuine examination, let alone scrutiny under the standards cited in Bell. See 441 U.S. at 541 n.23 (quoting Pell v. Procunier, 417 U.S. 817, 827(1974)). Thus, as in Bell, here there is "simply no evidence in the record to indicate that [Union County] officials exaggerated their response" to the "security problem and to the administrative difficulties" which would be posed by double bunking and continued severe overcrowding. 441 U.S. at 550.

The panel's bald and conclusory subordination of this interest to that of state officials, 713 F.2d at 993, 1002 (A48-49, 67-69), ends where Bell requires proper constitutional inquiry to begin.

In summary, the panel simply failed to undertake the traditional balancing and accommodation of interests inherent in and necessary to any due process inquiry. By failing to review the totality of the circumstances at the jail and to accord proper deference to the jail's administrators, the panel's interpretation of Bell overlooks the critical interests of pretrial detainees and their jailers. The Court of Appeals' analysis is not only in conflict with Bell but also effectively sanctions the wholesale withdrawal of the protections of the federal constitution from jail facilities.

C. The Panel Decision Conflicts With That of Every Other Circuit That Has Considered This Issue

No other Circuit in the country has

either adopted an analysis of Bell as restrictive as that employed by the panel, or tolerated conditions as severe as those the panel itself imposed on unwilling jail officials.

Other Circuits have uniformly concluded that Bell stands for the principle that double bunking is not per se unconstitutional, nor per se constitutional. These courts recognize that any analysis that calls for an examination of the "totality of the circumstances," as Bell requires, implies as much. Consequently, with the exception of the Court of Appeals in this case, the Circuits have consistently emphasized the necessity of considering the "totality of conditions" at a pretrial detention facility.[29]

---

[29] E.g., Lareau v. Manson, supra, 651 F.2d 96, 103 (2d Cir. 1981) ("Wolfish,...plainly did not hold that double-bunking, much less institution-wide overcrowding, was per se permissible....The question is one of degree and must be considered in light of the particular circumstances of each case and the particular facility in question"); Lock v. [FOOTNOTE CONTINUED ON FOLLOWING PAGE]

Furthermore, no other Circuit has parsed the consideration of living space from its assessment of the "totality of the circumstances."[30]

[FOOTNOTE CONTINUED FROM PRECEDING PAGE] Jenkins, 641 F.2d 488, 491-92 n.9 (7th Cir. 1981) ("This court finds it appropriate to consider all the conditions of confinement in order to determine whether they meet the Wolfish test of amounting to punishment"); Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir. 1981) (examining the "combined impact" of conditions); Campbell v. Cauthron, 623 F.2d 503, 507 (8th Cir. 1980) (applying the totality test); Jordan v. Wolke, 615 F.2d 749, 751 (7th Cir. 1980) (applying the totality test); Burks v. Teasdale, 603 F.2d 59, 63 (8th Cir. 1979) ("We do not hold categorically that putting two men in a cell with a floor space no larger than 65 square feet either is or is not constitutionally permissible. We think that a good deal may depend on the type of institution involved, the nature of the inmates, and the nature of the confinement itself") (citing Bell).

30 E.g., Lareau v. Manson, supra, (15 day limit imposed on double bunking in 60-65 square foot cells); Campbell v. Cauthron, supra, (35-40 square foot minimum cell space imposed for new detainees, 45-50 square feet if detention lasts a week). See note 31 infra. Numerous district courts also have considered minimum space requirements in relation to a totality analysis. E.g., Inmates of the Allegheny County Jail v. Wecht, 565 F.Supp. 1278 (D.Pa. 1983) (population ordered reduced to prescribed cap); Benjamin v. Malcolm, 564 F.Supp. 668 (S.D.N.Y. 1983); Martino v. Carey, 563 F.Supp. 984 (D.Or. 1983) (cell space of approximately 70 square feet ordered); Campbell v. McGruder, 554 [FOOTNOTE CONTINUED ON FOLLOWING PAGE]

And, no other Circuit has held that conditions of confinement as restrictive and stressful as present here are constitutional.[31]

[FOOTNOTE CONTINUED FROM PRECEDING PAGE] F.Supp. 562 (D.D.C. 1982) (30 day and 12 hours a day limit imposed on double-bunking in 70 square foot cells); Heitman v. Gabriel, 524 F.Supp. 622 (W.D.Mo. 1981) (banning double bunking); Vasquez v. Gray, 523 F.Supp. 1359 (S.D.N.Y. 1981) (104 square foot cells limited to two inmates).

[31] See Lock v. Jenkins, 641 F.2d 488, 492 (7th Cir. 1981) (with "no hesitancy" court concludes that conditions for detainees amount to punishment where 37 square foot cells housed one inmate, with net usuable space of only 17 square feet, where inmates received two hours per day of outdoor exercise, and ate meals on their laps); Lareau v. Manson, supra, 651 F.2d at 99-101 (punishment inferred by conditions in which two inmates were housed in 60-65 square foot cells, with open space reduced by furnishings to 36-41 square feet, where illumination in cell enough only for one inmate to read, meals taken in dayroom to which inmates had regular access, exercise permitted five days a week in outdoor courtyards for 1½ hours per day, and in indoor gym twice a week for 1½ hours, fighting and tension increased and visitation for each inmate reduced to 45 minutes per day as a result of overcrowding); Campbell v. Cauthron, 623 F.2d 503, 505 (8th Cir. 1980) ("no difficulty" finding due process violation with respect to crowding of inmates in multiple occupany cells providing between 28 to 17 square feet of living space per inmate, where cellblock corridor was found inadequate to provide opportunity for exercise, and where

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

The panel's decision here is dramatically inconsistent with the position of other Circuits. Not only are the untried men and women at the UCJ held in conditions that other circuits have determined "amount to punishment" under the Due Process Clause, but also the conditions tolerated by the panel would constitute cruel and unusual punishment under the Eighth Amendment in every other Circuit.[32]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE] meals were taken in cells; imposing minimum space requirements for detainees of 45-50 square feet if detention lasts a week or more). See also Jones v. Diamond, 636 F.2d 1364, 1373-74, 1375-76 (5th Cir.) (in banc) (remanding for imposition of a maximum population cap to eliminate overcrowding), cert. dismissed sub nom. Ledbetter v. Jones, 453 U.S. 950 (1981). Cf. Jordan v. Wolke, 615 F.2d 749, 751, 753 (7th Cir. 1980) (no constitutional violation where inmates' living quarters allowed 59 square feet per person, with access to cell, corridor, and dayroom, where design capacity of jail was not exceeded, and where no finding of adverse conditions resulting from population).

[32] See, e.g., Campbell v. Cauthron, supra, 623 F.2d at 506, 507 ("no trouble concluding" that convicted inmates subjected to cruel and unusual punishment where housed in cells affording 18-26 square feet of living space, and despite practice

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

The in banc dissenters were undoubtedly correct in noting that "[t]he minimum standards announced in the panel opinion for conditions of pretrial detention...are more severe than any that have been tolerated in any other locality in the United States." 718 F.2d at 1248 (dissent)(A3). But the panel's decision not only conflicts with that of every other Circuit for the confinement of humans, its analysis also allows conditions that are "far more severe than federal law tolerates for animals" in captivity. Id. at 1248 & n.4, 1252 &

[FOOTNOTE CONTINUED FROM PRECEDING PAGE] of "allowing inmates to walk around in the narrow corridor between cells"); Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977) ("the housing of two men within a little 35-40 square foot 'cubby-hole' was "equally or more offen[sive]" than other intolerable conditions to "contemporary standards of decency"; "minimum space to call one's own is a primary psychological necessity"); Burks v. Teasdale, 603 F.2d 59, 61-63 (8th Cir. 1979) (housing of two men in 47 square foot cells, allowing each 23.5 square feet of space, is unconstitutional; housing of two men in 65 square foot cells "and keeping them there for long periods of time can produce intolerable tensions and will almost inevitably cause trouble not only to the inmates but also to prison personnel").

n.6, 1258 (A3-4, 12, 25)(dissenting opinion) (citing Animal Welfare Act, 7 U.S.C. §§ 2131-2156 (1976); Cruelty to Animals Act, 45 U.S.C. § 71-74 (1976); implementing regulations, 9 C.F.R. §§ 1-4 (1983)). It is therefore important that the Court review a decision that wholly erodes any sense of constitutional protection for pretrial detainees and so completely conflicts with the application of Bell in other Circuits that untried and unconvicted detainees can now be treated far worse than captive animals.

D. Conclusion

The panel's decision fundamentally misconceives the role and responsibility of the federal courts in addressing the grave problems which severe overcrowding represents for antiquated local jails. This problem is not an isolated phenonmenon, but rather involves issues of national significance, as an increase in state prison

population throughout the country has led to overcrowding at local jails for presumptively innocent individuals.[33] Additionally, the panel has not only ignored the need for some constitutional protection of pretrial detainees; it also has totally rebuked the considered judgments of jail administrators. Faced with an antiquated and overcrowded jail, the panel imposed an unyielding "two men, one cell" principle that is wholly at odds with the balanced accommodation of competing interests mandated by Bell. To reach this result, the panel ignored the detailed factual findings of the Special Master and the District Court, and usurped

---

33 See note 4 supra. The Court previously has noted the disturbing consequences which befall the presumptively innocent "accused [who] cannot make bail" and is "generally confined [for months] in a local jail." See Barker v. Wingo, 407 U.S. 514, 520 (1972) (recognizing that the "overcrowding and generally deplorable state of those institutions," coupled with [l]engthy exposure to these conditions" 'has a destructive effect on human character'," and that the imposition of these consequences on "anyone who has not yet been convicted is serious....").

the power of lower courts to fashion appropriate equitable relief to remedy a situation that both the inmates and jail administrators considered intolerable.[34]

We respectfully submit that any decision that deviates so substantially from the Court's precedents, the decisions of other Circuits and the fundamental obligations of a federal court merits review in this Court.

---

[34] Here, the "scope of the remedy" decreed by the district court was directly related to the "nature of the violation." Swann v. Charlotte-Mecklenberg Board of Educ., 402 U.S. 1, 16 (1971). The Circuit panel disregarded the rule that in "shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." Lemon v. Kutzman, 411 U.S. 192, 200 (1973). See Hutto v. Finney, 437 U.S. 678, 687 n.9 (1978). Moreover, the remedial relief here, ordering removal of state prisoners from a county jail, has been used in comparable circumstances. E.g., Gross v. Tazewell County Jail, 533 F.Supp. 414, 418-20 (W.D.Va. 1982); Benjamin v. Malcolm, 528 F.Supp. 925 (S.D.N.Y. 1981). See also Duran v. Elrod, 713 F.2d 292, 297, 298 (7th Cir. 1983), where the Seventh Circuit recently upheld a more far-reaching decree providing for the reduction of the inmate population at the Cook County Jail through release, refusing to require double bunking as a "remedy."

II

THE COURT OF APPEALS DECISION, WHICH MANDATES THE DOUBLE BUNKING OF CONVICTED PRISONERS IN AN ANTIQUATED LOCAL JAIL AGAINST THE CONSIDERED JUDGMENTS OF THE JAIL'S ADMINISTRATORS, SHOULD BE REVIEWED BECAUSE IT CONFLICTS WITH THE ANALYSIS REQUIRED BY RHODES v. CHAPMAN, 452 U.S. 317 (1981), AND WITH THE CONSTITUTIONAL STANDARDS UNDER THE EIGHTH AMENDMENT ESTABLISHED IN EVERY OTHER CIRCUIT.

The panel's analysis of the Eighth Amendment suffers from the same analytical flaws discussed above. First, the panel severely distorts this Court's analysis in Rhodes v. Chapman, 452 U.S. 317 (1981), and effectively eliminates federal court review of conditions for post-conviction confinement at antiquated local jails. Second, by selectively applying only parts of the Rhodes analysis the panel's approach to the Eighth Amendment also conflicts with that of every other Circuit.

Rhodes v. Chapman identifies the pertinent factors that must be considered in any Eighth Amendment scrutiny of the con-

ditions in which a state may confine persons convicted of crimes. 452 U.S. at 344-47. Conditions of confinement are cruel and unusual if under contemporary standards of decency they, "alone or in combination," "deprive inmates of the minimal civilized measure of life's necessities." Id. at 347. Thus, it is from even a cursory review evident that Rhodes places overriding significance on an analysis of the totality of the circumstances in a facility. Id. at 362-63 & n.10 (Brennan, J., concurring).

Clearly, the Court's analysis in Rhodes did not focus solely on double bunking but rather examined the total effect of an "unanticipated increase in prison population." 452 U.S. at 348. The assessment of the totality in Rhodes revealed an environment that is fundamentally different from the Union County Jail. The facility in Rhodes was a modern facility equipped

with gymnasiums, workshops, school rooms, day rooms, two chapels, a hospital ward, commissary, barber shop and library. Outdoors there were recreation fields, a visitation area and a garden. The cells themselves contained an area of 63 square feet, a cabinet-type night stand, a wall-mounted sink with both cold and hot water, a toilet, a shelf, a radio, a window, and another cabinet. Id. at 348 & n.13. In these circumstances, the only deprivations produced by an increased population amounted to marginally diminished job and educational opportunities. Id. at 348. Violence had not increased, and any other detrimental consequences were merely a matter of "theory." Id. at 348-49. Indeed, the district court's findings of fact in Rhodes provided no support for the conclusion that double celling created even a "potential for frustration, tension or violence." Id. at 349 n.14. While double celling at the prison

in Rhodes did not constitute cruel and unusual punishment under the Eighth Amendment, the Court, after reaching this conclusion, indicated "the situation in a different case" could well produce the opposite result. Id. As the description of the unlighted and dismal conditions in the crowded cellblocks at the antiquated UCJ makes clear, the facility at issue here presents that "different case."

These essential differences, however, were overlooked by the panel because it distorted the Rhodes analysis in three fundamental respects. First, the panel completely omitted two important aspects of the Rhodes calculus from its analysis. Specifically, the panel initially failed to consider whether any challenged practices at this jail inflicted pain without a penological purpose. See 452 U.S. at 347, 348 (citing Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976)). Yet, it is clear from

the record that unnecessary and wanton pain was inflicted upon the inmates at the UCJ because the severe overcrowding, the increased exposure to infectious disease, the lack of clean clothing, the isolation from family and loved ones, and the total lack of exercise, serve absolutely no penological purpose.

In addition, the panel failed to consider whether the conditions at the UCJ are grossly disproportionate to the severity of the crimes committed by inmates sentenced to the county jail. See 452 U.S. at 347, 348 (citing Coker v. Georgia, 433 U.S. 584, 592 (1977)). The overwhelming majority of these inmates at the UCJ have been convicted of shoplifting, driving on the revoked list, failing to pay child support, or other minor property offenses. See JA263a-271a. Yet, these individuals are forced to suffer the mental stress of oppressive confinement at the UCJ without

respite, the physical degeneration from lack of exercise, the risk of serious injury in violent disruptions, the emotional pain of no real visitation, and the health risk of contracting tuberculosis, hepatitis or other diseases easily communicable in close confinement. Because the panel misconstrued the basic teachings of Rhodes, the court of appeals completely overlooked these critical aspects of a proper Eighth Amendment analysis.

Second, the panel erroneously isolated only one element from the totality calculus mandated by Rhodes. Specifically, the panel referred to the use of "floor mattresses" as "indeed the only condition not meeting constitutional standards," 713 F.2d at 994 (A51-52), rather than considering, as Rhodes mandates, the interrelationship of the population and all other jail conditions. This sharp and unprecedented deviation from the Rhodes

calculus resulted partly from the panel's mistaken reliance on an analysis that first appeared in Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981). See 713 F.2d at 999 & n.23 (A61-62). Wright, however, was decided more than three months before this Court's decision in Rhodes and can hardly be read as an interpretation of the subsequent decision. Even more important, Wright was implicitly rejected in a subsequent decision of the Ninth Circuit which is consistent with the totality approach. Hoptowit v. Ray, 682 F.2d 1237, 1247, 1249 ((9th Cir. 1982); see Ruiz v. Estelle, 679 F.2d 1115, 1139-40 n.98 (5th Cir. 1982). Therefore, the panel has followed a pre-Rhodes decision to formulate an approach that has been repudiated by every Circuit after Rhodes.

Third, and perhaps most important, the panel failed to employ the criteria established by this Court for determining

what meets Eighth Amendment standards. The district court and Special Master correctly relied on this Court's instruction to look to objective factors for guidance, such as objective indicia derived from history,[35] the action of state legislatures,[36] and the "public attitude toward a given sanction." 452 U.S. at 346-47, 348 n.13.[37]

---

[35] The district judge referred to nationwide jail practices to demonstrate that the vast majority of all local jails provided spatial conditions comparable to those required by his order. 537 F.Supp. at 1005 n.18 (A98-99 & n.18).

[36] Both the district court and Special Master, were guided by the objective standards set forth in New Jersey's substantive law regulating conditions in county jails, as well as by the assessments of state corrections officials on the relative importance of particular programs "in a county jail setting for alleviating physical and mental stress." See 537 F.Supp. at 1000, 1002, 1005, 1006, 1011 (A88, 91, 98, 99-101, 110-11); JA73a & n.9, 75a-76a, 82a-83a, 92a-93a, 96a-97a. The state's regulations derive from the New Jersey legislature's direction to the Corrections Department to promulgate regulations fixing minimum standards for inmate housing and care in county jails. See N.J.S.A. 30:1B-10. See generally note 37 infra.

[37] New Jersey's regulatory framework, on which the Special Master and the district court relied, see note 36 supra, clearly demonstrates that the

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

These objective considerations provide strong and compelling roots in Eighth Amendment criteria for the district court's decision.[38]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE] public in New Jersey does not endorse keeping inmates confined in the sordid conditions present at the UCJ. These regulations require, inter alia, 105 square feet of space per inmate as a standard for jail construction and renovation (see N.J.A.C. 10A:31-2.8(a)4 to -2.8(a)12), provision of opportunities for regular exercise (see N.J.A.C. 10A:31-3.16(b)10), and clean clothing. Moreover, the regulations are designed to fix "the minimum criteria" for "functions and operations of county correctional facilities", and "serve as a measure by which the citizens of New Jersey may better judge whether their communities' correctional programs are adequate to meet the needs of those incarcerated." N.J.A.C. 10A:31-1.1 (1979). See, e.g., Williams v. Edwards, 547 F.2d 1206, 1214 (5th Cir. 1977) ("[s]tate codes also are a valuable index into what levels of decency the public, expressing itself through the Legislature, is prepared to pay for."); accord Ramos v. Lamm, 639 F.2d 559, 567 & n.10 (10th Cir. 1980), cert. den. 101 S.Ct. 1759 (1981).

The district court also noted that New Jersey taxpayers had funded construction of new prison space to alleviate overcrowding and that public officials, including the Governor of New Jersey, had viewed the problem of overcrowding in county jails as "the results of [the state's] neglect" and emphasized that the state budget finally would begin to provide "the money to start to rectify this problem" by "plac[ing] state prisoners into state custody where they rightfully belong." 537 F.Supp. at 1009-10 (A107-108).

[38] The panel faulted the Master and the district court for not referring to "basic background facts" [FOOTNOTE CONTINUED ON FOLLOWING PAGE]

In contrast, the panel failed to point to any objective criteria that supports its mandatory double-bunking order. Indeed, the considered opinions of jail officials that overcrowding would plunge the jail into an "extremely volatile situation," (JA77a), was not even "deemed relevant in the panel's constitutional calculus." 718 F.2d at 1259 (dissenting opinion)(A27).

Finally, the panel decision conflicts with that of every other Circuit in the nation on important Eighth Amendment issues. For example, only days before the panel's decision, the Seventh Circuit affirmed a district court decision holding that housing only one person in conditions that are virtually identical to those at the UCJ that the panel mandated for two persons

[FOOTNOTE CONTINUED FROM PRECEDING PAGE] about the relationship between inmates and the jail authorities. 713 F.2d at 999 n.22 (A61-62 n.22). The Master's report and the district court opinion, however, are replete with descriptions of "background facts" depicting the deteriorating relationship between inmates and jail authorities caused by severe overcrowding. See notes 7 & 12 supra.

constituted cruel and unusual punishment.[39] The decision of the Seventh Circuit in Faulkner is entirely consistent with the analysis and approach followed in every other Circuit after Rhodes.[40]

---

[39] Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983), aff'g Hendrix v. Faulkner, 525 F.Supp. 435, 523 (N.D. Ind. 1981). See 537 F.Supp. at 1008. In Faulkner, as in the UCJ, the principal area to which inmates had access was a cell corridor. 525 F.Supp. at 523. The district court found, and the Court of Appeals concurred, that merely allowing the inmates to walk around in the corridor between the cells would not be adequate exercise because the inmates' cellblock area was used not only for sleeping but also during the waking hours (as it is in the UCJ). 525 F.Supp. at 524. Compare 713 F.2d at 995, 1000 n.29 (A54, 65-66 n.29) with 718 F.2d at 1258 (A25-26). Moreover, in Faulkner, unlike at the UCJ, inmates did get some outside exercise.

[40] The Fifth Circuit, in Ruiz v. Estelle, 679 F.2d 1115, 1140, 1146-48 (5th Cir. 1982), carefully evaluated the need for minimal living space in the context of a totality analysis under the Eighth Amendment. In a prison where inmates had access to gymnasiums, outdoor playing fields, craft shops, libraries, and dining rooms, and agricultural work, the Fifth Circuit affirmed a requirement that each inmate living in a dorm have at least 40 square feet of living space and vacated a prohibition on double bunking in 45 square foot cells, noting that it was the use of the cellblock living area only for sleeping which might make cell space of 18-20 square feet adequate. Accord Hoptowit v. Ray, 688 F.2d 1237, 1248-49 (9th Cir. 1982); see generally

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

Thus, the only anomaly in the decisions of the Courts of Appeals is the panel decision in the present case, which follows an analysis and reaches a result that would be constitutionally intolerable

[FOOTNOTE CONTINUED FROM PRECEDING PAGE]

Stewart v. Winter, 669 F.2d 328, 335-36 (5th Cir. 1982); Jones v. Diamond, supra, 636 F.2d at 1368, 1373.

The Fourth Circuit in Nelson v. Collins, 659 F.2d 420, 428 (4th Cir. 1981), in framing its Eighth Amendment analysis of double bunking in new state prisons comparable to the facility in Rhodes, also looked to considerations of living space, the substantial opportunities available to alleviate periods of close confinement with others, and observed that double bunking in the newer institutions left undisturbed a previous prohibition of double bunking in 40 square foot cells in older institutions. Id. at 422-23, 429. See Johnson v. Levine, 450 F.Supp. 648, 657, 658 (D.Md.), aff'd 588 F.2d 1378, 1381 (4th Cir. 1978).

Cf. Smith v. Fairman, 690 F.2d 1221 (7th Cir. 1982) (confining two inmates in 55 and 64 square foot cells does not cause an Eighth Amendment violation where inmates averaged 4 to 6 hours a day moving freely about the prison, some worked or attended school during the day, physical violence had been reduced, inmates enjoyed possession of electronic equipment including tape players, radios, or televisions in their cells, and almost unlimited personal property including books and records). Indeed, Smith highlights the fact that violent criminals in maximum security institutions are allotted far superior conditions than those imposed by the panel decision on persons convicted of relatively minor offenses who are confined at the antiquated Union County Jail.

in any other Circuit. Indeed, the panel decision is also inconsistent with the decisions of other Circuits antedating Rhodes, some of which the Court in Rhodes cited as examples of appropriate federal court action.[41] See 452 U.S. at 352 & n.17.[42]

---

41 See, e.g., Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. den. 101 S.Ct. 1759 (1981); Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).

42 The panel decision sharply conflicts with decisions from the Tenth Circuit, despite these decisions having been cited with approval by this Court in Rhodes. Compare 713 F.2d at 999-1000 nn.25 & 26 (A63 nn. 25 & 26) with 452 U.S. at 352 & n.17 (citing Ramos); id. at 364 (Brennan, J., concurring). In rejecting the Tenth Circuit's Eighth Amendment analysis as inconsistent with Rhodes, the panel totally misconceived the import of those decisions which focus on the necessity under the Eighth Amendment for a jail or prison to provide an "habilitative" environment, a term used in the Tenth Circuit, and similarly referred to by the district court here, to describe one of life's basic necessities, i.e., sufficient living space to make shelter "habitable", see 537 F.Supp. at 1008(A104-05) (citing Ramos v. Lamm, 639 F.2d 559, 568 (10th Cir. 1980); and Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977)). Thus, a requirement for minimum living space was not, as the panel apparently believed, see 713 F.2d at 999-1000 nn.25 & 26(A63), intended to create a rehabilitative environment, an objective that this Court in Rhodes explained was beyond the proper reach of Eighth Amendment analysis. See 452 U.S. at 348.

Not only has no other Circuit tolerated conditions of confinement for convicted inmates as inhumane as those at the UCJ, but they are of such severity that "[t]he conditions of crowding for human beings found by the Master would, if imposed on animals, violate federal law." 718 F.2d at 1252 n.6 (A12). The panel was only able to reach this result by ignoring most of the factors this Court has deemed integral to the Rhodes analysis and fundamentally misconceiving others.

For these reasons, the Court should grant certiorari.

III

THE COURT OF APPEALS DECISION, WHICH UNDERTOOK DE NOVO FACTFINDING IN ABROGATION OF ITS ROLE AS AN APPELLATE TRIBUNAL, SHOULD BE REVIEWED BY THIS COURT BECAUSE IT CONFLICTS WITH THE STRICTURES OF FED.R.CIV.P. 52(a).

The Court of Appeals de novo factfinding and disregard of the findings of a Special Master, which had been adopted without modification by the District Court, conflicts with this Court's admonition that "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). Rather than be confined by the clearly erroneous standard of Fed.R.Civ.P. 52(a), the panel "simply rewrote the facts" and indulged in repeated "speculation" to conclude that the Commissioner's remedial scheme was constitutionally sound and preferable to the district court's decree. 718 F.2d at 1258 (dissent)(A25-27).

The panel's disregard of the "clearly erroneous" standard for review of factual findings raises questions that are virtually identical to those presently before this Court in Bose Corporation v. Consumers Union, Inc., 692 F.2d 189, 195 (1st Cir. 1982), cert. granted 51 U.S.L.W. 3774 (1983). In Bose, the First Circuit held that an appellate court was not limited by a clearly erroneous standard in reviewing facts relating to a constitutional issue. Rather, the court "must perform a de novo review, independently examining the record...." Id. at 195. The panel here examined the record de novo as did the Court in Bose. Both in its explicit statement acknowledging its "own review of the record", 713 F.2d at 996-97 n.18(A56), and in many premises that underlie its reasoning, the panel failed to apply the "clearly erroneous" standard to basic historical facts. This approach is entirely contrary to the careful reliance

on detailed factual findings that the Court deemed essential to Due Proces and Eighth Amendment analysis in Bell and Rhodes. See Bell, 441 U.S. at 542 & n.25; Rhodes, 452 U.S. at 347-48. As a consequence of this unauthorized de novo review, the panel dramatically altered the Master's findings. See 713 F.2d at 996 (A54-55).[43]

Since the question presented is closely related to that in Bose, and since the panel failed to discharge a basic responsibility of an appellate court, the Court should grant certiorari in order to clarify the proper scope of review of factual findings in jail conditions' litigation.

---

[43] For example, the Master found the cell corridors "would allow little opportunity for free movement or exercise." (JA84a) Yet the panel concluded that the corridor provided an adequate area for inmates to obtain exercise. 713 F.2d at 1000 n.29 (A65). Such contradictory "findings" are found throughout the panel's opinon. See 718 F.2d at 1257-59 (dissent)(A25-27). Even more troubling is the panel's assumption that the jail could continue to provide essential services to inmates even if its population doubled, in direct contradiction of the Master's finding that overpopulation led to the critical deficiences in essential services at the UCJ. See 718 F.2d at 1257 (A25-27).

CONCLUSION

For the reasons stated above, the Court should grant certiorari to review questions of national importance relating to the proper role of federal courts in assessing the conditions of confinement in overcrowded and antiquated jails throughout the country.

Respectfully submitted,

JOSEPH H. RODRIGUEZ
Public Advocate

By: _____
THOMAS SMITH, JR.
First Assistant Public Defender
COUNSEL OF RECORD

T. GARY MITCHELL
Director, Office of Inmate Advocacy

SUSAN L. FERGUSON
Assistant Deputy Public Defender

ATTORNEYS FOR CROSS-PETITIONERS

83-1218

No.

IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM DI BUONO, ASSIGNMENT JUDGE, et. al.
Petitioners

v.

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated,
Cross-Petitioners,

v.

WILLIAM H. FAUVER, COMMISSIONER, DEPARTMENT OF CORRECTIONS, STATE OF NEW JERSEY, and his successor in his official capacity,
Respondent.

APPENDIX

T. GARY MITCHELL,
Director, Office of
Inmate Advocacy

SUSAN L. FERGUSON,
Asst. Deputy Public
Defender on the
Cross-Petition

*Counsel of Record

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE - DEFENDER

THOMAS SMITH*
First Asst. Public Defender

Department of the
Public Advocate
Richard J. Hughes
Justice complex
CN 850
Trenton, NJ 08625
(609) 292-1775

APPENDIX
TABLE OF CONTENTS

TABLE OF CONTENTS

Filed October 5, 1983.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5310

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated

v.

V. WILLIAM DI BUONO, Assignment Judge; JOSEPH G. BARBIERI, Criminal Assignment Judge; CUDDIE E. DAVIDSON, JR., Bail Judge; as Representatives of the Judges of the Criminal Courts of Union County; RALPH FROELICH, Union County Sheriff; JAMES SCANLON, Jail Administrator; THOMAS JEFFERSON, Jail Warden; ROSE MARIE SINNOT, Chairman, Board of Chosen Freeholders; GEORGE ALBANESE, County Manager; and their Successors in Office, in their official capacities, Randolph Pisane and Louis J. Coletti

v.

William H. FAUVER, Commissioner, Department of Corrections, State of New Jersey, and his Successor in his official capacity

William H. Fauver, Commissioner,
New Jersey Department of Corrections,
Appellant

United States Court of Appeals,
Third Circuit

APPENDIX A

October 5, 1983.

SUR PETITION FOR REHEARING

Before: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges* and WEBER, *District Judge**

The petition for rehearing filed by appellees, Union County Jail Inmates, TimmieLee Barlow, Elbert Evans, Jr., Raymond Skinner, James Wysocki, on behalf of themselves and all other persons similarly situated, in the above entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Circuit Judges Gibbons, A. Leon Higginbotham and Sloviter would grant the petition for rehearing.

Circuit Judge Gibbons' statement sur denial of petition follows.

By the Court

Leonard I. Garth
Circuit Judge

DATED: October 5, 1983

* Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

GIBBONS, *Circuit Judge*, dissenting from the denial of a petition for rehearing, with whom, A. Leon Higginbotham and Sloviter, Circuit Judges join:

> The Office of Inmate Advocacy of the New Jersey Public Advocate-Defender,[1] petitions for rehearing of a decision of this court which substantially reversed all of the relief ordered by the district court in an action challenging the constitutionality of conditions of confinement in the Union County, New Jersey Jail.[2] The minimum standards announced in the panel opinion for conditions of pretrial detention and post conviction confinement in this circuit are more severe than any that have been tolerated in any other locality in the United States.[3] Indeed those standards, considering that we are dealing with the treatment of human beings, compare unfavorably with the standards mandated

---

1. The New Jersey Public Advocate-Public Defender is a cabinet level state officer charged with a variety of public functions. N.J. Stat. Ann. 52:27E-1 to -47 (West Supp. 1983-1984). New Jersey law creates, in the Office of the Public Defender, the Office of Inmate Advocacy. N.J. Stat. Ann. 52:27E-10 (West Supp. 1983-1984). That office is charged with the responsibility of representing the interests of inmates in jails, prisons, penitentiaries and similar facilities in New Jersey. N.J. Stat. Ann. 52:27E-12 (West Supp. 1983-1984).

2. The district court opinion is reported. Union County Jail Inmates v. Scanlon, 537 F.Supp. 993 (D.N.J. 1982).

3. *See* Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981); Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981); Jones v. Diamond, 636 F.2d 1364 (5th Cir. (en banc)), *cert. dismissed sub nom.* Ledbetter v. Jones, 453 U.S. 950 (1981); Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980); Fischer v. Winter, 564 F. Supp. 281 (N.D.Cal. 1983); Martino v. Carey, 563 F. Supp. 984 (D. Ore. 1983); Campbell v. McGruder, 554 F. Supp. 562 (D.D.C. 1982), *on remand from* 580 F.2d 521 (D.C. Cir. 1978); McMurry v. Phelps, 533 F. Supp. 742 (W.D.La. 1982); Vasquez v. Gray, 523 F. Supp. 1359 (S.D.N.Y. 1981); Hutchings v. Corum, 501 F.Supp. 1276 (W.D. Mo. 1980); Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980).

APPENDIX B

by federal law for the treatment of animals.[4] Common human decency demands that the panel opinion be reconsidered by the full court. Moreover in arriving at a grossly inhumane and indecent result, the panel chose to disregard both the strictures of Fed. R. Civ. P. 53(e)(2) with respect to findings of fact made by a master, and the appropriate deference which should be accorded to the trial court in fashioning injunctive relief for past and threatened violations of the basic human liberties protected by the fourteenth amendment. Thus I dissent from the denial of the petition for rehearing.

I.
The Master's Findings

The Public Advocate's complaint seeks preliminary and permanent injunctive relief from all actions which confine inmates of the Union County Jail in such conditions of overcrowding as to deprive them of constitutionally protected rights. Hon. Harold A. Ackerman, the district court judge to whom the complaint was assigned, pursuant to Rule 53, on January 29, 1982 appointed Hon. Worrall F. Mountain as Special Master.[5]

That rule provides that "[i]n an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." Fed. R. Civ. P. 53(e)(2). A court functioning in a reviewing capacity cannot make individualized findings which the master who heard the testimony did not make. *Bennerson v. Joseph*, 583 F.2d 633, 641 (3d Cir. 1978). A reviewing court commits reversible error in failing to accept find-

4. *See* Animal Welfare Act, 7 U.S.C. §§2131-2156 (1976); Cruelty to Animals Act, 45 U.S.C. §§71-74 (1976); implementing regulations, 9 C.F.R. §§1-4 (1983).

5. The Special Master, a former Justice of the Supreme Court of New Jersey, is particularly well qualified for that position. The district court judge is also particularly knowledgeable about the conditions of the Union County Jail, having served for many years in Union County as Judge of the New Jersey Superior Court.

ings of a master which are not clearly erroneous. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 689 (1946). "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Fed. R. Civ. P. 52(a). As such, they are insulated, in the Court of Appeals, by the clearly erroneous standard of Rule 52. Thus there is no warrant in the law for factfinding in this court.

The material facts found by the master with respect to the Union County Jail facility are as follows:

> The UCJ is an aging eight story detention facility located in the heart of Elizabeth, New Jersey. It is designed to house for short periods of time, pretrial detainees and convicted individuals sentenced, in Union County, to prison terms of less than one year. *N.J.S.A.* 2C: 43-10.
>
> The prison contains 218 "general population" cells which are spread throughout 19 "tiers" or cellblocks on the third through fifth floors of the facility. Each cell is equipped with a single bed and a combination toilet/sink fixture and all but two of them measure approximately 39 square feet in area.[3] The general population cells on each tier open into a common area known as the "cell corridor" which is approximately 5½ feet wide and varies in length from 40 feet to 70 feet depending upon the number of cells in a given tier.[4] It is in this area that the inmates spend the overwhelming majority of their waking hours.
>
> Inmates are locked in their cells between 10 p.m. and 6 a.m.; at all other times of the day they are permitted access to the cell corridor. Each cell corridor is equipped with one television set and one telephone. There are no lights in the cells or the cell corridors — the only illumination in these areas comes from the lights in the "officer's corridor" which runs parallel to the cell corridor and is separated from it by iron bars. The County concedes that

lighting on the tiers could be improved and I have been informed that steps are being taken to that end.

In addition to the general population cells, there are currently three dormitories, two of them temporary, that are being used to house inmates. The "trustees/work release" dormitory on the first floor of the jail consists of two rooms separated by a wire mesh fence. The trustee side measures approximately 595 square feet and the work release side is approximately 513 square feet in area. The two rooms, combined, currently are capable of housing approximately 26 inmates on single and double bunk beds.

A portion of the men's exercise area has been converted into temporary dormitory use. This area, which is separated from the recreation area by a wire mesh partition, measures approximately 1,038 square feet and is capable of housing approximately 26 to 28 inmates. A second temporary dormitory has been constructed in what was formerly the women's recreation area adjacent to the women's tier on the fifth floor. This area measures approximately 374 square feet and is capable of housing approximately eight women. Inmates housed in the two male dormitories (except "trustees") spend the vast majority of each day confined to the dormitory area. The women housed in the temporary women's dormitory, for security reasons, spend their waking hours locked in the cell corridor on the women's tier with all other women prisoners.

In addition to the general population cells, there are ten detention/isolation cells at the UCJ ranging in size from 83 square feet to 113 square feet. These cells are used to house inmates guilty of disciplinary infractions or inmates in need of isolation, e.g., for medical reasons. Each cell contains a

single bed and some are equipped with toilet fixtures.

App. at 66-69

The quoted findings describe a facility designed to hold 218 general population inmates, on a short term basis; so short that no provision was made in the cellblocks for illumination which would permit the inmates to read. In addition to the designed capacity of 218 general population inmates, the "trustees/work release" dormitory houses 26 inmates. Thus arguably the facility's designed capacity is as high as 244 inmates. By converting the men's exercise area and the women's recreation area to dormitory space, the County has increased the capacity to 278 inmates.

The material facts found by the master with respect to inmate population, as contrasted with capacity, are as follows:

> In recent months, the daily population of the UCJ has averaged well over 300 inmates. The population on the day I toured the facility, February 8, 1982, was 350 inmates, 92 of whom were awaiting transfer to state prisons. On February 15, 1982, the population had risen to 359, 81 of whom have been sentenced to and are awaiting transfer to state facilities.[5] Of the 359 inmates housed at the UCJ on Feb-

---

3. Two remaining cells, one in A tier and the other in B tier, provide approximately 47 square feet of living space.

4. Twelve of the tiers contain twelve cells each and the cell corridor in each of these tiers measures approximately 5½ feet by 60 feet or 330 square feet. Five tiers contain eight cells per tier and the cell corridors in these tiers are approximately 5½ feet by 40 feet or 220 square feet. The remaining two tiers contain seventeen cells each and the cell corridors are approximately 5½ feet by 70 feet or 385 square feet.

5. I have been informed that as of February 24, 1982, the total inmate population at the UCJ was 385. Of that total, 101 were awaiting transfer to a state correctional institution.

ruary 15, 1982, 196 had been there for 45 days or more and 131 had been there for at least 75 days. Of the 131 inmates housed for 75 days or more, 57 were state sentenced prisoners. As of February 15, 1982, 206 pretrial detainees were being held at the UCJ.

Despite extensive efforts by the defendant, County, to create sufficient bed space to handle the overflow of prisoners, jail administrators simply have been unable to create suitable housing for all inmates. For the past several months, the County has been forced to "double cell" inmates on the general population tiers. Since there is only one bed in each of the individual cells, double celling requires that one inmate sleep on a mattress placed on the floor at night. This second mattress, measuring approximately 16 square feet, must be placed adjacent to the toilet in the cell. It occupies virtually all of the otherwise free floor space in the cell. The parties agree that some inmates have been double celled for extended periods of time (several weeks). Further, it is agreed that the overwhelming majority of inmates subjected to the double celling practice have been pretrial detainees.[6]

Double celling of large numbers of inmates in the UCJ has resulted in a serious reduction in the amount of square footage available per inmate, both in the cells themselves and in the cell corridors. With respect to the individual cell conditions double celling, of course, requires that two inmates share a total of 39 square feet of space for approximately eight hours per night. During the day, the average square footage per inmate is somewhat higher because during daytime hours inmates have access to

6. Out of a total of 162 inmates being double celled in general population cells on February 24, 1982, approximately 142 were pretrial detainees.

their cells and the cell corridor. Depending upon the extent of double celling on any given tier at a particular point in time, however, the average square footage per inmate during daytime hours is still very low.

For example, in each tier with twelve individual cells, the combined square footage of the cells and the cell corridor is approximately 798 square feet.[7] Thus, when those tiers are operating at normal maximum levels (one inmate per cell) there exists approximately 67 square feet of "daytime" space per inmate which includes the beds and toilet/sink fixtures. In each tier with eight cells, the daytime figure is approximately 66 square feet per inmate and in the two tiers with seventeen cells that figure is approximately 62 square feet per inmate. When double celling is practiced in one-half of the cells in any 12-cell tier, the square footage available per inmate during daytime hours is reduced by one-third, to approximately 45 square feet (44 square feet in the tiers with 8 cells; 41 square feet in the tiers with

---

7. The combined square footage figure is calculated as follows:

cell corridor:	60 ft. x 5.5 ft.	=	330 sq. ft.
12 cells:	12 x 39 ft.	=	468 sq. ft.
			798 sq. ft.

The square footage of the cells and cell corridor in each of the 8-cell tiers is approximately 530 sq. ft. calculated as follows:

cell corridor:	5.5 ft. x 40 ft.	=	220 sq. ft.
8 cells:	8 x 39 ft.	=	312 sq. ft.
			532 sq. ft.

The square footage of the cells and cell corridor in the 17-cell tiers is approximately 1,057 sq. ft. calculated as follows:

cell corridor:	70 ft. x 5.5 ft.	=	385 sq. ft.
16 cells:	16 ft. x 39 ft.	=	624 sq. ft.
one cell:	1 x 47 ft.	=	47 sq. ft.
			1,056 sq. ft.

17 cells). When double celling is present throughout all cells in a 12-cell tier, the square footage per inmate during daytime hours is reduced to 33.5 square feet (33 square feet in 8 cell tiers; 31 square feet in 17 cell tiers).[8] For purposes of comparison, it is noted that the New Jersey administrative regulations governing new prison construction provide that all future single occupancy cells shall be not less than 70 square feet in area and further provide that separate day rooms containing 35 square feet per inmate shall be constructed in each new jail. *N.J.A.C.* 10A:31-2.8(a)(4)(12). Thus, current New Jersey regulations suggest that the "ideal" square footage per inmate housed in a county jail should be approximately 105 square feet.[9]

In addition to the extensive use of double celling provoked by the overcrowding problem, when the UCJ population reaches the 365-370 figure, jail officials are forced to require some inmates to sleep on mattresses placed on the floor in places such as the laundry area and the law library area.

---

8. As of February 24, 1982, there was "total" double celling on 3 tiers, the A and B tiers (34 inmates in each 17-cell tier) and the women's tier (24 inmates in a 12-cell tier). When total double celling is present throughout the women's tier, as was the case on February 24, 1982, female inmates at the UCJ actually have even less average square feet per inmate during daytime hours than indicated in the text for a typical 12-cell tier. The reason is that all women housed in the female dormitory are moved into the sole women's cell corridor during daytime hours for security reasons. This further exacerbates the overcrowding conditions in the women's cell corridor. On February 24, 1982, for example, 32 women were being housed on the tier during daytime hours. Thus, the average square footage per inmate was a paltry 25 feet.

9. While the United States Supreme Court in *Bell v. Wolfish* stated that statistics similar to those found in *N.J.A.C.* 10A:31-2.8 "do not establish the constitutional minima" for average square footage per inmate, the Court did acknowledge that they "may be instructive in certain cases." 441 *U.S.* 520, at 542, n. 27, 99 *S. Ct.* 1861, n. 27, 60 *L.Ed.* 2d 447, 471 (1979).

These inmates must continue to sleep on mattresses until there is a drop in the population count or until released or sent to another facility. It is undisputed that some inmates might be required to sleep on mattresses laid on the floor in various parts of the jail for extended periods of time.

The overcrowding conditions in the detention/isolation cells at the UCJ are the most serious in the jail. As of February 8, 1982, there were a total of 32 inmates being housed in ten detention/isolation cells for a variety of disciplinary reasons.[10] Some of these cells currently are being used to house as many as four inmates for extended periods of time. Since each detention cell is designed to hold only one inmate and is equipped with but a single bed, as many as three inmates have been forced to sleep on mattresses laid on the floor of the cells. In cells with three or four prisoners, these mattresses take up a very large percentage of the floor space. There are no cell corridors in the detention cell area and, thus, detention inmates are forced to spend all but a few hours a week confined to the cell itself.[11] Some of the detention cells are equipped with a toilet/sink fixture and group showers are provided to detention/isolation inmates daily.

App. at 69-74.

These findings establish that the inmate population has at times reached the point where female inmates have been allotted 25 square feet of living space (less space for toilet, washstands and bunks), and male inmates have been allotted 33.5 square feet (less space for toilets, washstands and bunks). Since a mattress meas-

10. One inmate was being housed in isolation for medical reasons. Thus, 31 inmates were sharing the nine other detention cells.

11. Detention cell inmates currently are permitted to enjoy the limited recreation and visitation privileges available to general population inmates. See *infra* 1252-1254.

ures 16 square feet, a bunk must occupy at least that much space. A toilet and washstand large enough to be functional for adults must occupy at least another two square feet. Thus the master's findings establish that women inmates have at times been allocated as little as 7 square feet of space in which to function over protracted periods, and men inmates as little as 15.5 square feet.[6] The absence of illumination in the cells suggests that even staying in bed all day to read is not a viable alternative.

The material facts found by the master with respect to the effects of the overcrowding which he found are as follows:

> The severe overcrowding conditions outlined above have had an adverse impact on numerous as-

---

6. Federal regulations for the humane treatment of nonhuman primates provide:

> *Space requirements.* (1) Primary enclosures shall be constructed and maintained so as to provide sufficient space to allow each nonhuman primate to make normal postural adjustments with adequate freedom of movement.
> (2) Each nonhuman primate housed in a primary enclosure shall be provided with a minimum floor space equal to an area of at least three times the area occupied by such primate when standing on four feet.

9 C.F.R. §3.78(b) (1983). Federal regulations for humane treatment of certain other warm blooded animals provide:

> Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

9 C.F.R. §3.128 (1983). *See also*, 9 C.F.R. §3.104 (space requirements for humane treatment of marine mammals). The conditions of crowding for human beings found by the master would, if imposed on animals, violate federal law.

A typical federal judge's desk top is approximately 22 square feet.

pects of the inmates lives. The overcrowding has severely taxed the County's available resources and make it impossible for it to continue to comply with certain state regulations governing the operations of county jails. One of the most serious cutbacks has occurred in the area of inmate recreational privileges. *N.J.A.C.* 10A:31-3.16 (b)(10) provides that inmates housed in county jails are to be "permitted at least one hour of physical exercise and recreation each day outside the housing unit." Due to the large inmate population and the reduction in the size of the men's recreation area, prison officials have been forced to limit male recreation privileges to no more than one hour periods, twice per week. I note that the recreational equipment available to male prisoners is extremely limited consisting primarily of a ping-pong table and a weight machine. Under existing conditions, I find that there is almost no realistic opportunity for male inmates to enjoy recreation while confined at the UCJ. Further, the total elimination of what was formerly the women's recreation area has resulted in the suspension of *all* recreational privileges for women. The absence of a meaningful opportunity for the male and female inmates housed at the UCJ to enjoy physical exercise is particularly disturbing in view of the conditions of inmate confinement in the cell corridors. (citation omitted).

Another inmate privilege sharply curtailed as a result of the overcrowding problem is visitation privileges. The former visitation policy permitted inmates to visit with family and friends, for anywhere from fifteen minutes to one-half hour, three times per week. As a result of the sheer volume of visitors arriving at the UCJ on visitation days, the County has been forced to limit the time for each visit to a maximum of five to ten minutes. Even with this shortening of visitation time, jail officials are not al-

ways able to accommodate the large number of visitors.

A second area in which I find that the County has been unable to comply with State regulations is with regard to the provision of clean clothing to inmates. *N.J.A.C.* 10A:31-3.13(b)(5) requires that inmates be provided with a complete change of clothing at least once weekly and that clean towels be provided daily. While jail officials stated that they have made every effort to comply substantially with this regulation, I am persuaded by the several affidavits submitted to me by the inmates that there has not been complete compliance. There have been allegations that some inmates have been required to wear the same clothing for periods of several weeks or more. I find that the County's inability to comply with this important regulation is entirely attributable to the overcrowding conditions.

I find that the provision of other services to inmates has been curtailed and/or delayed as a result of the prison overcrowding. Prison officials continue to provide the inmates with counseling programs, chapel services, educational activities, access to the general library and law library, and other related programs, but the staffing available to administer these various programs is limited and officials admit that they have encountered problems in administering these services.

I find that the sanitary conditions of the inmate housing areas and the kitchen are satisfactory. The food service is adequate and I note that both the inmates and the corrections officers eat the same diet from the prison kitchen. I find that the provision of medical and dental services to inmates is adequate except in one important respect. County officials acknowledge that new inmates are not given a complete physical examination at the time of commitment. Officials from the State Department of

> Corrections testified that the absence of such a program could pose a serious health risk to the inmates and I share those views.
>
> There is no question that the overcrowding situation has resulted in an increase in scattered instances of inmate fighting, etc., at the UCJ. County officials testified that there was a recent stabbing incident in one of the cells, which arose from a dispute between double celled inmates as to which inmate was going to sleep on the mattress laid on the floor. I do not find, nor do any of the parties assert, that the increased tensions in the jail amount to a serious security problem at the present time. I think it bears noting, however, that all parties believe that, if the current overcrowding conditions carry over into the hot summer months, an extremely volatile situation will be presented.

App. at 74-78.

These findings establish that the female inmates spend protracted periods deprived of all recreation opportunities, that male inmates fare little better with respect to recreation, that both men and women are afforded few visitation privileges, have been deprived of sanitary clothing, have had access to reading materials terminated, have been exposed to the risk of transmitting infectious diseases, and in some instances have been forced to sleep on mattresses on the floor in inappropriate locations, *all as a result of overcrowding*. No wonder, then, that the master also found that overcrowding has already resulted in an increase in scattered instances of inmate fighting, etc., but that conditions of overcrowding creates a risk of other more serious problems involving violence.

The Master concluded that the conditions described in these findings violated the fourteenth amendment, and recommended, among other steps a reduction, over a reasonable period, of the inmate population to its ac-

tual capacity of 244, preferably by removing sentenced inmates to state facilities. App. at 93. That recommendation tacitly rejected the testimony of certain state officials that the Union County Jail could with certain adjustments actually house 369 inmates.

II.

The State Defendants' Objections to the Master's Report

The Objections to the Master's Report filed by the Attorney General did not take serious issue with the facts found by Justice Mountain. Indeed the Attorney General observed:

> As has been true throughout these proceedings, there is no significant controversy between the parties as to most of the essential facts in the case with certain exceptions which will be set forth herein. The dispute between the parties has focused (and continues to focus) on the legal conclusions drawn from underlying facts, and assuming arguendo, that the operations of the Union County Jail are deficient in some respects, from a constitutional standpoint, what the appropriate remedies are — the Special Master's proposed conclusions of law and his recommendations.

App. at 102. The "certain exceptions" referred to in the Objections to the Master's Report dealt for the most part not at all with the facts as to the facilities, the population, and the consequences of housing that population in those facilities. They dealt only with the recommendation that the population be reduced. It was the Attorney General's position that the Master should have accepted his expert's testimony "that with certain space adjustments, the jail could actually house 369 inmates without the necessity of double-celling and at the same time achieving recreation for inmates of both sexes." App. at 110.

The Attorney General did not concede, however, that even the adjustments which his expert suggested were required by the fourteenth amendment. Rather, he urged:

> Finally, the Special Master's constitutional findings are seemingly premised on stricter standards of inmate comfort than the minimum constitutional standard established by the United States Supreme court. Careful scrutiny establishes that the jail conditions, while not ideal, are not in fact unconstitutional. As to the convicted inmates, no "pain" let alone "unnecessary or wanton pain" is inflicted. Discomfort or annoyance, yes; but pain, no. As to the detainees, conditions are not imposed to punish, but merely to secure the jail and manage the jail and accommodate it to the large population.

App. at 110-11.

Two things are significant about the Attorney General's Objections to the Master's Report. The first is that he urged that as a matter of law *no* remedy was required. The second is that he did not urge, as a remedy for any violation which might have occurred, the continuation or extension of the practice of double-celling. *See* App. at 149-50.

At a later stage in the proceeding, after the court heard argument on the Objections to the Master's Report, the Attorney General stated his position on the double-celling practice. In a supplemental brief he urged that all of the conditions found by the Master to be violations of law could be alleviated by placing double bunks in the 218 general population cells. App. at 176. This would, of course, permit an increase in the potential population from 359 to at least 464 (436 in the general population cells and 28 in the "trustees/work release" dormitory). The alleviation would occur by virtue of the elimination of the two temporary dormitories housing 28 men and 8 women. The Attorney General's proposal,

then, was to permit the confinement of two adults in a space of 39 square feet between 10 p.m. and 6 a.m., relieved by access to the cellblock corridors, and by such recreation off the cellblock as could be provided in two restored recreation areas designed for a prison population of 218. The proposal did not suggest how other deprivations, which the Master found to be the result of overcrowding, could be alleviated by an increase in population.

III.
The District Court's Ruling

The district court reviewed the Master's findings of fact in accordance with the standard specified in Rule 53(e)(2) and concluded:

> I have determined that none of the proposed findings of fact are clearly erroneous, and I shall therefore adopt them without modification.

Union County, supra, 537 F. Supp. at 1001. Addressing the Attorney General's contention that even with double bunking no constitutional violation occurred, the court observed:

> The stark reality is that, whether provided with bare mattresses or mattresses placed on a frame, when the 39 square feet general population cells are shared by two persons, each person has 19.5 square feet of space inclusive of furniture and fixtures for the period of lock-up at night. Double-bunking in the UCJ is therefore roughly equivalent to quadruple-bunking in the MCC at issue in *[Bell v.] Wolfish* [441 U.S. 520 (1979)]. Such spatial starvation cannot pass muster constitutionally. Even the incarcerated are entitled to something more than a walk-in closet.
>
> Furthermore, there is no relief during the day from the adverse effects of overcrowding. As the Special Master found

> The cell corridors and dormitories where the inmates spend the overwhelming majority of their waking hours are cramped, overcrowded and would allow little opportunity for free movement or exercise even at normal population levels. The pretrial detainees currently housed in general population cells or dormitories at the UCJ can do little more than watch television from 6:00 a.m. in the morning to 10:00 p.m. at night.

SMR. at 22. If I assume that only half of the cells on any one tier are to be double-bunked under the Commissioner's proposed remedy,[17] the average corridor space per person for daytime use will be between 15 and 21 square feet. Added to one person's share of the space of a double-bunked cell, a pretrial detainee at the UCJ is restricted nearly twenty-four hours a day to an area which the Court in *Wolfish* rules was barely sufficient for sleeping purposes. It falls far short of the 105 square feet governing new prison construction in this state. N.J.A.C. 10A: 1-2.8 (a) (4), (12).

Other courts have found jails with similar or more generous spatial dimensions than those in the UCJ unconstitutional. *See Lareau, supra; Campbell v. Couthron*, 623 F.2d 503 (8th Cir. 1980); *Heitman v. Gabriel*, 524 F.Supp. 622 (W.D. Mo. 1981); *Vazquez, supra; Hutchings v. Corum*, 501 F. Supp. 1276 (W.D. Mo. 1980); *Benjamin v. Malcolm*, 495 F. Supp. 1357 (S.D.N.Y. 1980). Thus based solely

---

17. This premise is reasonable when based on a population at the UCJ of at least 359 because, assuming I order the elimination of the temporary dormitories and I restrict the detention cells to no more than double occupancy as recommended by the Special Master, 115 out of the 218 general population cells would have to be double-celled. On the day the Special Master toured the UCJ, three tiers were totally double-celled, restricting these inmates to less than 15 square feet of corridor space.

on considerations of space, I find that doublecelling or double-bunking at the UCJ subjects pretrial detainees to genuine hardships amounting to punishment in violation of the Fourteenth Amendment.

My decision does not rest upon an incorporation into the Due Process Clause of the various correction associations' recommendatons with respect to the number of square feet appropriate for daytime space in a jail such as that contained in *N.J.A.C.* 10A: 31-2.8(a). *See Wolfish, supra*, 441 U.S. at 543-44 n.27, 99 S.Ct. at 1876-77 n.27. However, the 30 to 40 square feet allotted to a doublebunked detainee is grossly inadequate in comparison to any of these professional standards.[18]

Furthermore, overcrowded cells cannot be examined for constitutionality in isolation from the overall circumstances in the facility. *Wolfish, supra*, 441 U.S. at 525, 99 S.Ct. at 1866. In MCC, the hardships, if any, which are imposed upon pretrial detainees by double-bunking are mitigated by the unlimited daytime access to the large common areas. In UCJ, the more serious privations are aggravated by the overcrowded corridors, and the lack of meaningful recreation and other necessities. (For the female inmates, there is a lack of any recreation.) What the Second Circuit stated in *Lareau* with respect to the detention facility in Hartford, Connecticut, is applicable here: "[T]here is no real respite for the double-bunked inmate from the pressures of overcrowding." 651 F.2d at 101.

---

18. For a summary of the recommendations of various commissions, courts and professional organizations, see 3 National Institute of Justice, American Prisons and Jails 2-7 (1980). The recommendations range from 50 to 80 square feet per inmate. Approximately 88% of local jails, according to the National Jail Census, have at least 40 square feet of floor space. 1 National Institute of Justice, American Prisons and Jails 83 (1980).

Union County, supra, 537 F. Supp. at 1005-06 & nn. 17-18.

Addressing the Attorney General's contention that by double-bunking the general detention cells the temporary dormitories could be eliminated, and the dormitory space restored for recreational uses, the court observed:

> The Commissioner proposes that elimination of the temporary dormitories for the men and women in conjunction with the establishment of a double-bunking practice would remedy any unconstitutional condition at the UCJ. I find this proposal to be unsatisfactory. It is doubtful that recreation will improve so long as the population is as high as it has been for several months even if the size of the recreation room is returned to its normal dimensions. The third-party defendant, in effect, is proposing a trade-off of one "genuine privation" for another. Either the pretrial detainees suffer increased crowding in the cells in order to enjoy slightly improved recreation opportunity or they suffer with the present recreation situation in order to enjoy slightly less crowded cells.[20]
>
> Nor is access to a crowded corridor an adequate substitution for real exercise and recreation. The Special Master found the corridors sufficient only for passive activities, such as watching television.

Union County, supra, 537 F. Supp. at 1006.

The court also addressd the effect that the double-bunking proposal would have on visitation privileges, noting:

---

20. The impact of double-celling has been greatest on the pretrial detainees. Of the 162 inmates subject to double-celling on February 24, 1982, 142 were pretrial detainees. SMR at 8 n.6. This degree of double-celling occurred even though there has been established at the UCJ two temporary dormitories in the former recreation spaces. Recreation and housing in the UCJ are flip sides of the same coin.

> The overcrowded condition of the UCJ is the cause not only of inadequate recreation but also, as found by the Special Master, of reduced visitation privileges. This, too, aggravates the tensions already present because of double-bunking. As testified to by Assistant Commissioner Hilton, visitation has a very significant impact on the mental well-being of an incarcerated person.[21] Under the present circumstances, visits have been limited to five to ten minutes, if not indirectly discouraged altogether.[22]

Id.

Looking at the totality of circumstances, the court concluded:

> I have determined that double-bunking at the UCJ violates the due process rights of pretrial detainees. It constitutes "confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardships over an extended period of time." *Wolfish, supra*, 441 U.S. at 542, 99 S.Ct. at 1875.

Union County, supra, 537 F. Supp. at 1007. Addressing the distinct problem of sentenced inmates in light of the same totality of circumstances, the Court concluded:

> Although the standard against which the court must judge conditions imposed upon sentenced offenders is more stringent than that which guides the analysis of the conditions of confinement of pretrial detainees, I find that the conditions at the UCJ are too egregious to satisfy either standard. Double-bunking, as practiced at the UCJ or as proposed, except in the detention/isolation cells, violates the Eighth Amendment as well as the Fourteenth Amendment.

---

22. For some friends and relatives, the prospect of a five-minute visit cannot justify the travel and waiting time. *See, e.g.*, Affidavits of Inmates Terrell and Thomas, SMR Appendix at A91-96.

Union County, supra, 537 F. Supp. at 1008-09.

It is plain that neither the master nor the district judge focussed on isolated phenomena at the Union County Jail as violations of the Constitution. Rather the violation found by both was the overall condition of overcrowding: the practice of confining human beings over long periods in space so small that they would inevitably suffer severe stress from lack of exercise, lack of variety in activity, too frequent intimate contact with fellow inmates, and too little contact with friends and counselors. The Court's declaratory judgment is explicit in this regard:

> ORDERED that the findings of fact of the Special Master be adopted and that the Union County Jail be declared unconstitutionally overcrowded.

Union County, supra, 537 F. Supp. at 1014.

In fashioning a remedy for the overall condition of overcrowding, the Court carefully weighed competing considerations. Since the overall condition of overcrowding was the constitutional violation which was found, the court addressed that problem directly by fixing the maximum capacity of the Union County Jail, until it is enlarged, at 259, with one person in each general population cell and 26 persons in the "trustee/work release" dormitory. *Id.* at 1015 (Order of April 27, 1982, paragraph (g)). That Order conforms to the Master's finding that the Maximum Capacity of the facility was 244 as it stood, and 259 on completion of 15 new intake cells. Because that population level could not be achieved at once, the court provided three months within which to comply. Because New Jersey statutes provided that sentenced inmates should normally be removed to state penal institutions, while county jails are normally available for housing of pretrial detainees, the court ordered that sentenced prisoners be removed. *Union County, supra*, 537 F. Supp. at 1015.

Given the district court's finding that the overall

condition of overcrowding was the constitutional violation, the central provision of the judgment, fixing a maximum number of inmates, was tailored precisely to that violation. The time limit for accomplishing that relief was well within any rational limits of district court discretion in fashioning remedies. The decision to require removal of sentenced inmates was a reasonable accommodation between the competing demands upon the limited space of the Union County defendants for housing of pretrial detainees and of the state defendants for warehousing sentenced inmates.

IV
The Panel Decision

On appeal the Attorney General reiterated the argument that even if every general population cell were double-bunked and filled there would be no constitutional violation of the rights of either the pretrial detainees or the sentenced inmates. The panel accepted this argument in toto, by vacating the central provision of the district court's remedial order, which fixed a maximum population for the Union County Jail. *Union County Jail Inmates v. Scanlon*, No. 82-5310, slip op. at 39-40 (3d Cir. Aug. 11, 1983). The effect of this Court's judgment is that there is no limit on overcrowding. The panel opinion endorses the position that each of the general population cells may be double-bunked, that the "trustees/work release" dormitory may be retained, and that the 15 new intake cells could be double bunked. *See Id.* at 996. The vacation of the Order fixing a maximum, with a clear indication that double bunking would be permitted in the general population cells and the fifteen new intake cells, suggests that on remand the district court must tolerate, in a facility designed for the temporary short term custody of 233 persons (218 general population cells and 15 new intake cells), a population as high as 494 inmates. At that population, or any-

thing even nearly approaching it, the spatial constraints on the inmates will be, in proportion to size, and considering differences between men and beasts, far more severe than federal law tolerates for animals under the statutes and regulations governing their custody. *See* 9 C.F.R. §§ 3.128, 3.78(b) (1983).

In arriving at so fundamentally inhumane a result, moreover, the panel completely ignored the limits of their reviewing authority imposed by Rules 52 and 53. Freely substituting their own factfinding for that of the Master, the panel members simply rewrote the facts to make it seem that the conditions in the Union County Jail are other than as found by the Master and the district court. Examples follow.

The Master found that "[t]he cell corridors . . . where the inmates spend the overwhelming majority of their waking hours are cramped, overcrowded and would allow little opportunity for free movement or exercise even at normal population levels." App. at 84. The panel, which unlike the Master, did not observe the facility first hand, finds that a cellblock corridor, even when the cells are fully double-bunked, "does provide adequate space for such exercises as push-ups, sit-ups, and even walking." *Union County*, *supra*, slip op. at 35 n.29. Imagine, if you can, the degree of social cooperation which would be required for the suggested exercises when 24 persons occupy a space measuring 60 feet x 5.5 feet! Compare the requirement that "[e]ach nonhuman primate housed in a primary enclosure shall be provided with a minimum floor space equal to an area of at least three times the area occupied by such primate when standing on four feet." 9 C.F.R. § 3.78(b)(2) (1983).

The panel relies upon the "promised daily hour of recreation" as a factor mitigating the inevitable tensions resulting from 23 hours in the cramped conditions of the cellblock. The district court found, however, that "[i]t is doubtful that recreation will improve so long as the pop-

ulation is as high as it has been for several months even if the size of the recreation room is returned to its normal dimensions." *Union County, supra*, 537 F. Supp. at 1006. There is no finding by the Master or the district court supporting the panel's speculation that the restored recreation rooms will suffice to provide even one hour off the cellblock in 24. There is no record support for that speculation. The record establishes that the recreation rooms were built for a population of 244, not 494. *See* App. at 90. Even if operated around the clock they are not likely to provide significant alleviation from the tension generated by 23 hours a day cheek to jowl in the cellblocks; that, entirely aside from the logistical problem of moving so many persons through the antiquated facility.

The panel concluded that despite an increase in population, clean clothing would be provided. *Union County, supra*, at 995. In so finding, the panel rejected a specific finding by the Master that "[w]hile jail officials stated that they have made every effort to comply substantially with this regulation [requiring a change of clothing at least once a week and clean towels daily], I am persuaded by the several affidavits submitted to me by the inmates that there has not been complete compliance. . . . I find that the County's inability to comply with this important regulation is entirely attributable to overcrowding conditions." App. at 76. No record evidence supports the panel's illogical speculative finding that if the overcrowding is increased the county's ability to comply will increase rather than decrease.

The panel finds that the effects of overcrowding on the cellblocks would be "mitigated" by "promised visitation." *Union County, supra*, at 996 n.17. The Master found that:

> As a result of the sheer volume of visitors arriving at the UCJ on visitation days, the County has been forced to limit the time for each visit to a maximum

> of five to ten minutes. Even with this shortening of visitation time, jail officials are not always able to accommodate the large number of visitors.

App. at 76. One may search the record in vain for a shred of evidence that with an increased population the County jail officials will be better able to accommodate the larger number of visitors.

In an effort to minimize the appearance of harshness in its procrustean decree the panel attempts its own analysis of duration of confinement of pretrial detainees. *Union County, supra*, at 996-997 & n. 18. In doing so, however, it selects, not the list of inmates dated February 15, 1982 which was considered by the Master and the district court in making their findings, but a list dated a month earlier which, not suprisingly, produced a lower percentage of pretrial detainees confined at the Union County Jail for over 60 days.

Even with respect to the highest recorded inmate population, the panel made a finding of 385, *Union County, supra*, at 995 n. 14, whereas the district court correctly found that on April 19, 1982 the jail population had reached 392 inmates. *Union County, supra*, 537 F. Supp. at 999.

Finally, and inexplicably, the panel simply ignores findings by the Master and the district court that instances of fighting amongst the inmates have increased due to the overcrowded conditions at UCJ. App. at 77; *Union County, supra*, 537 F. Supp. at 1000. Apparently the inevitable propensity for violence resulting from confining human beings in excessively close proximity to each other over long periods without relief is not deemed relevant in the panel's constitutional calculus.

As to the law announced in the panel opinion, I will say no more than that *Bell v. Wolfish*, 441 U.S. 520 (1979), on which it principally relies, lends no support for the proposition that human beings can lawfuly be subjected by a state to the conditions of confinement

found by the Master. The opinion of the district court correctly analyzes the caselaw. By disregarding the Master's findings, and fragmenting the case as if it did not involve an interrelated set of intolerable conditions, all resulting from overcrowding, the panel opinion has applied bits and pieces of language in *Bell v. Wolfish* in a manner the Supreme Court never intended. *See Lareau v. Manson*, 651 F.2d 96, 99-105 (2d Cir. 1981); *Lock v. Jenkins*, 641 F.2d 488, 491-94 (7th Cir. 1981); *Jones v. Diamond*, 636 F.2d 1364, 1373-74, 1375-76 (5th Cir.) (in banc), *cert. dismissed sub nom. Ledbetter v. Jones*, 453 U.S. 950 (1981); *Campbell v. Cauthron*, 623 F.2d 503, 504-08 (8th Cir. 1980).

V.
Conclusion

A society whose laws provide for greater attention to the conditions of confinement of animals than for the conditions of confinement of human beings is pathological. In the name of our common humanity we dissent from the denial of rehearing.

Filed October 6, 1983.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5310

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated

v.

V. WILLIAM DI BUONO, Assignment Judge; JOSEPH G. BARBIERI, Criminal Assignment Judge; CUDDIE E. DAVIDSON, JR., Bail Judge; as Representatives of the Judges of the Criminal Courts of Union County; RALPH FROELICH, Union County Sheriff; JAMES SCANLON, Jail Administrator; THOMAS JEFFERSON, Jail Warden; ROSE MARIE SINNOT, Chairman, Board of Chosen Freeholders; GEORGE ALBANESE, County Manager; and their Successors in Office, in their official capacities, Randolph Pisane and Louis J. Coletti

v.

William H. FAUVER, Commissioner, Department of Corrections, State of New Jersey, and his Successor in his official capacity

---

ORDER

IT IS ORDERED that this Court's order filed on October 5, 1983, denying rehearing in banc in the above-captioned matter is amended to add the following statement following the paragraph begin-

ning "Judges Gibbons, Higginbotham and Sloviter. . ." but before the paragraph beginning "Judge Gibbons' statement sur denial. . ."

"Judge Weis votes for rehearing but does not join in Judge Gibbons' opinion."

By the Court,

Leonard I. Garth
Circuit Judge

Dated: October 6, 1983

Filed on August 11, 1983.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5310

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated

v.

V. WILLIAM DI BUONO, Assignment Judge; JOSEPH G. BARBIERI, Criminal Assignment Judge; CUDDIE E. DAVIDSON, JR., Bail Judge; as Representatives of the Judges of the Criminal Court of Union County; RALPH FROELICH, Union County Sheriff; JAMES SCANLON, Jail Administrator; THOMAS JEFFERSON, Jail Warden; ROSE MARIE SINNOT, Chairman, Board of Chosen Freeholders; GEORGE ALBANESE, County Manager; and their Successors in Office, in their official capacities, Randolph Pisane and Louis J. Coletti

v.

WILLIAM H. FAUVER, Commissioner, Department of Corrections, State of New Jersey, and his Successor in his official capacity

William H. Fauver, Commissioner,
New Jersey Department of Corrections,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(Civil Action No. 81-863)

APPENDIX D

Argued December 14, 1982
Before: HUNTER and GARTH, *Circuit Judges*
and WEBER, *District Judge**
(Opinion Filed August 11, 1983)

Irwin I. Kimmelman
Attorney General of New Jersey
Joseph T. Maloney (Argued)
Deputy Attorney General
Michael R. Cole
Of Counsel
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
Attorneys for Appellant

Joseph H. Rodriguez
New Jersey Public Advocate-Defender
Office of Inmate Advocacy
T. Gary Mitchell (Argued)
Director, Office of Inmate Advocacy
Phyllis G. Warren
Assistant Deputy Public Defender
Department of the Public Advocate
Hughes Justice Complex, CN 850
Trenton, New Jersey 08625
Attorney for Union County Jail Inmates, Barlow, Evans, Skinner, Wysocki, et al.

---

*Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation

Robert C. Doherty (Argued)
County Counsel for the
County of Union
Administration Building
Elizabethtown Plaza
Elizabeth, New Jersey 07207
Attorney for Appellees, Froehlich, Scanlon, Jefferson, Sinnott, Albanese and their Successors in Office, in their official capacities

---

OPINION OF THE COURT

GARTH, *Circuit Judge*.

I.

This case raises serious and complex questions of the constitutionality of conditions under which pre-trial detainees and sentenced inmates are confined at the Union County Jail (the Jail). All parties agree that the Jail is seriously overcrowded and dispute exists only as to whether that overcrowding and the conditions that result from it are so shocking that confinement in the Jail amounts to punishment of the pre-trial detainees in violation of the due process clause or to cruel and unusual punishment of the sentenced inmates in violation of the Eighth Amendment. The district court held that the conditions are unconstitutional for both classes of inmates and that the unconstitutionality could only be remedied if the Commissioner of the Department of Corrections of the State of New Jersey removed those inmates sentenced to state prison. We cannot agree.

II.

On March 25, 1981, inmates of the Union County Jail (hereinafter inmates) filed this civil rights action un-

der 42 U.S.C. §1983, alleging that the Jail was over-populated[1] and that the "totality of conditions" at the Jail violated the inmates' constitutional right to due process and equal protection of the laws and their right to be free from cruel and unusual punishment. The complaint sought a declaration that the conditions at the Jail were unconstitutional and an injunction ordering the County to reduce the population to constitutional levels. The complaint was brought as a class action, the class consisting of all persons who were then, or who during the pendency of the suit would become, incarcerated in the Jail. The class, certified by the district court, included pre-trial detainees[2] (inmates awaiting trial and not considered bailworthy) and inmates sentenced to terms either in the Jail or in state prison. The complaint named as defendants various judges,[3] administrators of the jail, and county officials (hereinafter known collectively as the County).

On April 3, 1981, the County filed an answer to the complaint, admitting that the inmates were held in the

---

1. The State of New Jersey is in the midst of a serious statewide prison overcrowding emergency. *See* Exec. Order No. 106 (Byrne) (June 19, 1981), No. 108 (Byrne) (September 11, 1981), No. 1 (Kean) (January 20, 1982), No. 27 (Kean) (May 20, 1982), No. 43 (Kean) (July 15, 1983). As a result of New Jersey's new criminal code, 23% more incarcerative sentences were imposed in the first six months of 1981 than during the comparable period in 1980, and the length of such sentences significantly increased. Union County Jail Inmates v. Scanlon, 537 F. Supp. 993, 996 & n. 3 (D.N.J. 1982) (opinion below) (hereinafter *Union County*). Consequently, prison population was projected to increase 38% from 1981 to 1982. *Id.* at 996 n. 5. The state prison system is filled to 117% of its design capacity for maximum and medium security inmates and the jail systems of the other counties in the State are also beyond design capacity. Construction of new correctional facilities has not kept pace with the demand for prison space. *Id.* at 996.

2. On February 15, 1982, 57% of the Jail population consisted of pre-trial detainees. *Union County*, 537 F. Supp. at 999.

3. The action against the various judges was later dismissed. App. 2a.

overcrowded conditions specified in the complaint. In a third-party complaint filed on the same day against the Commissioner of the New Jersey State Department of Corrections (the Commissioner), the County attributed any unconstitutionality of conditions at the Jail to overcrowding resulting from the refusal of the Commissioner to accept for custody those prisoners who had been sentenced to state prison. The County argued that, pursuant to N.J. Stat. Ann. 2C:43-10(e) (West 1982), the Commissioner was required to remove from county facilities, within 15 days after sentencing, those inmates sentenced to terms in state correctional facilities (state prisoners). The County sought a declaration that the Commissioner's refusal to accept state prisoners was unconstitutional and sought an injunction permanently preventing him from refusing to take custody of state prisoners.

On June 19, 1981, responding to the state-wide prison overcrowding problem, Governor Byrne issued Executive Order No. 106,[4] in which he declared that

---

4. The provisions of Executive Order No. 106 were extended by Governor Byrne on September 11, 1981 (No. 108) and by Governor Kean on January 20, 1982 (No. 1). We take judicial notice of the fact, not a part of the record below, that Governor Kean extended the prior Executive Orders on May 20, 1982 (No. 8), on January 10, 1983 (No. 27), and on July 15, 1983 (No. 43) (extending until January 20, 1984). The New Jersey Appellate Division upheld the validity of the Executive Order on September 4, 1981. *Worthington v. Fauver*, 180 N.J. Super. 368 (App. Div. 1981). On January 6, 1982, the Supreme Court of New Jersey unanimously affirmed the judgment of the Appellate Division. *Worthington v. Fauver*, 88 N.J. 183, 440 A.2d 1128 (1982).

Executive Order No. 106 provided in relevant part:

> NOW, THEREFORE, I, BRENDAN T. BYRNE, Governor of the State of New Jersey, . . . do hereby DECLARE a state of emergency and ORDER and DIRECT as follows:
>
> 1. I DECLARE, that a state of emergency exists in the various State and County penal and correctional facilities . . .

overcrowded conditions in New Jersey's State Prisons and county facilities constituted a state of emergency, and that flexibility was needed in the assignment of in-

---

NOTE — (Continued)

2. I invoke such emergency powers as are conferred upon me by the Laws of 1942, Chapter 251 (N.J.S.A. App. A:9-30, *et seq.*) and all amendments and supplements thereto.

3. I hereby DIRECT that the authority to designate the place of confinement of all inmates confined in all State and/or County penal or correctional institutions shall be exercised for the duration of this Order by the designee of the Governor.

4. I hereby designate the Commissioner of the Department of Corrections to effectuate the provisions of this Order.

5. The Commissioner may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether owned by the State, a County, or any political subdivision of this State, or any other person, for the confinement of inmates confined in the State and/or County penal or correctional institutions.

8. I further ORDER that the authority of the Commissioner to designate the place of confinement of any inmate may be exercised when deemed appropriate by the Commissioner regardless of whether said inmate has been sentenced or is being held in pretrial detention except that only persons sentenced to a prison or committed to the custody of the Commissioner may be confined in a State Prison.

10. The Commissioner of Corrections shall develop an appropriate compensation program for the counties.

11. It shall be the duty of every person in this State or doing business in this State, and the members of the governing body, and of each and every official, agent, or employee of every political subdivision in this State and of each member of all other governmental bodies, agencies and authorities in this State of any nature whatsoever, fully to cooperate in all matters concerning this emergency.

14. This Order shall take effect immediately. [June 19, 1981]

App. 587a-89a

mates in order to maximize the use of space. The Order suspended the operation of N.J. Stat. Ann. 2C:43-10(e) (West 1982), and empowered the Commissioner of Corrections to designate the place of confinement for both state and county inmates, whether pretrial detainees or sentenced inmates. The Commissioner, exercising the discretion conferred by the Executive Order, designated the Jail as the place of confinement for state prisoners sentenced in Union County. The Commissioner determined that the Jail, with modifications of the existing structure, could accommodate a number of inmates greater than its rated capacity.

On October 22, 1981 the district court approved a consent agreement between the County and the inmates. The Commissioner was not a party to the agreement. This agreement specified a maximum population capacity of 238 for the Jail (assuming there would be one person in each general population cell) and designated a procedure whereby the County could request an immediate hearing before the district court in the event the population of the Jail approached or reached the maximum capacity specified. The agreement contemplated that the district court might, under such circumstances, order the release or transfer of enough inmates to reduce the population below the stated maximum. On that same date, the court entered an order directing the Commissioner to show cause why he should not be compelled to accept custody of all state prisoners in the Jail.

On November 10, 1981, the Commissioner filed a motion to vacate and set aside the consent judgment under Fed. R. Civ. Proc. 60(b)(1) and 60(b)(6), on the grounds that it was entered without the consent of the Commissioner, and that the consent given by the County was illegal as *ultra vires* under state law. The Commissioner contended that the County was without the authority to enter such an agreement, under the terms of Governor Byrne's Executive Orders Nos. 106 and 108.

On December 16, 1981, the district court stayed scheduled hearings on the County's order to show cause and the Commissioner's motion to vacate the consent judgment, pending the decision of the New Jersey Supreme Court in *Worthington v. Fauver*, 88 N.J. 183, 440 A.2d 1128 (1982). On January 6, 1982, the Supreme Court of New Jersey in that case unanimously held that Executive Orders Nos. 106 and 108 (Byrne) were a valid exercise of the power delegated to the Governor under the Civil Defense and Disaster Control Act, N.J. Stat. Ann. App.A:9-30 *et seq.* (West 1982), that the Orders did not violate the state constitutional doctrine of separation of powers, and that the Commissioner's actions pursuant to the orders were not arbitrary or capricious.

On December 21, 1981 the inmates made a motion to hold the County in contempt for failure to abide by the consent decree. On January 8, 1982 the County made a motion to vacate the consent judgment. The district court held a hearing on January 20, 1982 in order to consider the two motions previously stayed (the County's motion for a preliminary injunction against the Commissioner, and the Commissioner's motion to vacate the consent judgment) as well as the two new motions. The district court reasoned that if the County could comply with the consent judgment, then the necessary actions would be within the scope of the County's authorized responsibility and the Commissioner would lack standing to attack the consent order.

On January 29, 1982, the district court, pursuant to Fed. R. Civ. P. 53(b), appointed a Special Master to investigate conditions at the Jail and to assess the County's efforts under the consent judgment. Pending return of the Special Master's Report within 45 days, the district court denied without prejudice the Commissioner's motion to vacate the consent order and deferred ruling on the other motions.

The Special Master filed his Report and Recommendations on March 1, 1982. Most notably, the Special

Master found that, because of overcrowding, general population cells designed for one inmate were being used to house two inmates by use of mattresses placed on the floors of these 5' x 7' cells next to the toilet. The better part of the men's exercise area and all of the women's recreation area had also been converted into temporary dormitories, in which inmates slept on mattresses placed on the floor. Altogether, with respect to the pretrial detainees, the Special Master found six specific conditions that he regarded as constitutional violations. See note 11, *infra*.[5]

With respect to the sentenced inmates, the Special Master found two conditions that he regarded as constitutional violations. The Special Master recommended that these specific violations should be cured, and that the Commissioner should be given a reasonable time to bring the population of the Jail down to the limit specified by the consent judgment. He also found that the County had made a good faith attempt to comply with the provision of the consent judgment requiring maintenance of essential and other inmate services, and that any failures on the County's part were due to the overcrowding problem.

On March 12, 1982, the Commissioner filed objections to the Special Master's Report. He argued that the Special Master should have recommended only the correction of the particular objectionable conditions, rather than the transfer of state inmates. The Commissioner noted that the practice of double-bunking inmates had not been regarded as unconstitutional *per se* by the Special Master.[6] The Commissioner argued that the County

---

5. In order to avoid unnecessary repetition of the findings these conditions will be set forth in detail only in connection with our analysis of the district court's conclusions.

6. In a footnote the Special Master stated "I make no ruling on the feasibility or constitutionality of [equipping the general population cells with two beds] since that question was not raised in the record before me." App. 90a.

need only equip its general population cells with two bunk-type beds in order both to eliminate the unconstitutional practice of placing mattresses on the floor and to increase the recreational opportunities for both male and female inmates. He argued further that clean clothes could be provided to inmates at least once each week and a medical screening procedure instituted, insofar as the County already had an inmate-operated laundry on the premises and a doctor and medical staff at the jail every day. On March 25, 1982, the court held a hearing on the Commissioner's objections to the Special Master's Report.

On April 27, 1982, the court filed an opinion and order, adopting the findings of fact of the Special Master without modification. The court held that the totality of circumstances resulting from overcrowding at the Jail, and most notably forcing pre-trial detainees to sleep on mattresses placed on the floor, constituted a violation of the detainees' due process rights. The court rejected the Commissioner's contention that installation of double-bunks and other improvements could remedy these unconstitutional conditions. The court held that, based on space considerations alone, double-celling "amounted to punishment," in violation of the detainees due process rights. The court also held that requiring the sentenced inmates to sleep for extended periods on mattresses placed on the floor constituted cruel and unusual punishment. It held, in addition, that even if bunk beds were substituted for floor mattresses, the shelter provided would fail to meet "contemporary standards of decency" and thus violate the Eighth Amendment, since the sentenced inmates would have only 30 square feet of daytime space and 19.5 square feet of sleeping space.

Having concluded that the conditions in the Jail were constitutionally impermissible, the court held that, under the Supremacy Clause, the Executive Orders that had caused the overcrowding in the Jail must yield. The court declared the Commissioner's action of designating

the Jail as the place of confinement for state prisoners void and ordered the Commissioner to remove, by July 1, 1982, all state prisoners who on that date had been confined in the Jail for fifteen days or more since being sentenced to terms of imprisonment in state facilities. The order also required full compliance with N.J. Stat. Ann. 2C:43-10(e) (West 1982) thereafter.

The court also directed the County, pursuant to its duties under the consent judgment, to implement a medical screening program, to reinstate the recreation and visitation programs at prior levels, and to comply with state regulations that require it to provide inmates with clean clothing and towels.

The Commissioner appealed from the April 27, 1982 order. Neither the County nor the inmates have appealed.

III

Jurisdiction

When the district court entered its April 27, 1982 order, there were three pending motions before the court. First, the motion of the County for a preliminary injunction directing the Commissioner to remove state prisoners from the Jail; second, the motion of the inmates to hold the County in contempt of the consent judgment; and third, the motion of the County to vacate the consent judgment. The motion of the Commissioner to vacate the consent judgment, denied without prejudice in the district court's January 29, 1982 order, was apparently not renewed by the Commissioner,[7] and the district court ordered that the consent judgment be continued in full force and effect.

---

7. At oral argument before this court, counsel for the Commissioner indicated that he continued to regard the consent judgment as invalid.

The district court disposed of these motions by enjoining the defendants "to reduce the population of the Union County Jail to constitutional levels." The court "declare[d] that the failure and continued refusal of the Commissioner . . . to comply with the mandates of N.J.S.A. 2C:43-10(e) is unconstitutional" and "permanently enjoined the Commissioner . . . from refusing to accept State prisoners from the Union County Jail in conformity with N.J.S.A. 2C:43-10(e)." *See Union County*, 537 F. Supp. at 1009, 1015. The order thus implicitly denied the motion of the inmates to hold the County in contempt of the consent judgment. Finally, the order "continue[d] in full force and effect, except as modified or supplemented," the consent judgment approved on October 22, 1981. *Union County*, 537 F. Supp. at 1015. Accordingly, the order, disposing of all claims by all parties, and leaving "nothing to be done but to enforce . . . what has been determined," is "final" for purposes of 28 U.S.C. §1291. *Richerson v. Jones*, 551 F.2d at 918, 922 (3d Cir. 1977). It is from this order that the Commissioner appeals.[8]

---

8. The April 27, 1982 order, as noted, continued the consent judgment in full force and effect, and indeed amplified the provisions of that agreement. The provisions of that judgment having significance to the Commissioner were those confirming the agreed-upon "maximum capacity" for the Jail (Paragraph (f)), giving the defendants until July 1, 1982 to achieve that population figure (Paragraph (g)), and empowering the County to "notify the Department of Corrections to remove any state prisoners who have remained at the facility beyond the statutory fifteen (15) day period since sentence was imposed" (Paragraph (h)).

In his notice of appeal from the April 27, 1982 order, the Commissioner expressly noted that he was appealing from that order which, *inter alia*, "continues in full force and effect the Consent Judgment approved on October 22, 1982." It is clear from the Commissioner's original motion that the thrust of his objection to the consent judgment is that

> the sole final authority to decide, *under New Jersey state law*, what the Union County Jail inmate population capacity or

The County did not appeal from the April 27, 1982 order continuing the consent judgment in full force and effect.

IV.

Pre-trial Detainees

A.

The constitutional framework and the more particular standard governing the due process rights of pre-trial detainees were articulated by the Supreme Court in *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Bell* the Court held that

> [i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is *whether those conditions amount to punishment* of the detainee.

---

maximum shall be, is reposed solely [sic] in the Commissioner of Corrections who is the Third Party Defendant in this case, William H. Fauver.

App. 35a (affidavit of Joseph J. Maloney) (emphasis in original).

It is further plain, in light of the decision of the New Jersey Supreme Court in *Worthington*, that the Commissioner is correct as a matter of state law. The County was indeed without authority to agree to the population maximum. The only legal basis for the district court's continued endorsement of a maximum figure, is the holding that a population exceeding this number of inmates had resulted in unconstitutional conditions. It is even more plain that the district court's imposition of a target date, and his order to the Commissioner permanently to comply with N.J. Stat. Ann. 2C:43-10(3) (West 1982), can be supported only on the basis of the district court's holding that conditions at the Jail were unconstitutional and could be remedied only by removal of the state prisoners.

Other than the provisions of (f), (g) and (h) noted herein, we do not understand the Commissioner to object to any provision of the consent judgment.

Bell v. Wolfish, supra, 441 U.S. at 535 (emphasis added). Noting that the Government may detain an individual to ensure his presence at trial, *id.* at 536, and that the Government traditionally has done so by "confinement in a facility which . . . results in restricting the movement of a detainee," *id.* at 537, the Court concluded that the necessary inquiry was whether "the conditions and restrictions of the detention facility . . . amount to punishment." *Id.* at 536-37. In order to determine whether "particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word," *id.* at 538, the Court stated that the list of factors identified in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)[9] would provide useful guideposts. Focussing particularly upon the last two of the *Mendoza-Martinez* factors, the Court concluded that it "must decide whether the disability is imposed for the purpose of punishment or whether it is an incident of some other legitimate governmental purpose," and whether the disability or restraint "appears excessive in relation to the alternative purpose assigned [to it]." *Bell v. Wolfish, supra*, 441 U.S. at 538 (*quoting*

---

9. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) the Court, called upon to determine whether a statutory provision depriving individuals of citizenship constituted punishment, articulated a list of factors "traditionally applied to determine whether an Act of Congress is penal or regulatory in character." *Mendoza-Martinez, supra*, 372 U.S. at 168. These were:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69 (footnotes omitted).

Mendoza-Martinez, 372 U.S. at 168-69). The Court stated that, in the event that such a condition or restriction "is not reasonably related to a legitimate goal — if it is arbitrary or purposeless — a court permissibly may infer that the purpose of the governmental action is punishment." *Bell v. Wolfish, supra*, 441 U.S. at 539.

Developing this analysis further as it pertained to detainees, the Court stated:

> [I]n addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.

Bell v. Wolfish, supra, 441 U.S. at 540 (footnote omitted). The Court also noted that, in determining whether conditions and restrictions are reasonably related to such a purpose,

> courts must heed our warning that '[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."

Id., 441 U.S. at 540 n.23 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

Finally, in applying these constitutional principles to the facts of the *Bell* case, the Court articulated the following standard for determining when untoward conditions of confinement are such as to be arguably excessive in relation to the purpose of managing the facility:

> confining a given number of people in a given amount of space in such a manner as to cause them

> to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment.

Bell v. Wolfish, supra, 441 U.S. at 542.

Thus, in determining in the present case whether conditions at the Jail are such as to amount to punishment, which would violate the due process rights of pre-trial detainees, we must ask, first, whether any legitimate purposes are served by these conditions, and second, whether these conditions are rationally related to these purposes. In assessing whether the conditions are reasonably related to the assigned purposes, we must, further, inquire as to whether these conditions "cause [inmates] to endure [such] genuine privations and hardship over an extended period of time," that the adverse conditions become excessive in relation to the purposes assigned for them. *Id.*

B

On January 29, 1982, the district court, having before it motions by the County and the Commissioner to vacate the consent judgment, a motion by the inmates to hold the County in contempt of the consent judgment, and the motion by the County for a preliminary injunction ordering the Commissioner to remove state prisoners, and with the benefit of the New Jersey Supreme Court's ruling in *Worthington v. Fauver*, 88 N.J. 193 (1982), 440 A.2d 1128 (1982), determined that "the court is desperately in need of detailed information on the jail conditions as well as what efforts were or could have been made to abide by the consent order." App. 55a. To acquire this information, the district court thereupon appointed as Special Master the Honorable Worrall F. Mountain, a former Justice of the New Jersey Su-

preme Court[10] and a member of Governor Byrne's Task Force on Prison Overcrowding. App. 56a.

Justice Mountain made a tour of the facility on February 8, 1982, interviewed officials, administrators, corrections officers, and inmates, took testimony from state correctional officials, held discussions with counsel, and considered affidavits and other documents. App. 65a. On March 1, 1982, he filed a report setting forth proposed findings of fact, conclusions of law, and remedial recommendations. App. 63a-98a. The district court, noting that pursuant to Fed. R. Civ. P. 53(e) the Special Master's findings must be accepted unless clearly erroneous, *Union County, supra*, 537 F. Supp. at 998, adopted them without modification. *Id.* at 1001.

The Special Master found, App. 80a, and the district court specifically agreed, "that there has been no express intent to punish the inmates at the UCJ on the part of either the defendants or the third-party defendant." *Union County, supra*, 537 F. Supp. at 1002. This finding has not been questioned by any of the parties. Thus, we may proceed directly to the second step of the two-step *Bell* inquiry, and determine whether a legitimate purpose or purposes may be assigned for conditions at the Jail, and whether those conditions are excessive in relation to their purpose or purposes.

The district court held in substance that the effective management of a detention facility during a statewide prison overcrowding emergency, along with "the interests of local and state governments in not releasing [inmates] onto the streets," *Union County, supra*, 537 F. Supp. at 1003, were the two relevant legitimate governmental interests that might justify conditions at the Jail. *Id.* at 1002-03.

---

10 Justice Mountain was a member of the New Jersey Supreme Court from 1971 until his retirement in June of 1979. App. 56a.

It is plain that there is a legitimate governmental interest in "effective management of [a] detention facility." *Bell v. Wolfish, supra*, 441 U.S. at 540. Yet, as the division of interests in this case between the County and the Commissioner reveals, "effective management of a detention facility during a statewide prison overcrowding emergency" serves two distinct governmental interests. First, the State of New Jersey has an interest, validated by the New Jersey Supreme Court in *Worthington v. Fauver, supra*, in "efficiently allocat[ing] inmates of state and county penal and correctional institutions to those institutions having available space in order to alleviate [statewide] overcrowding." *Worthington v. Fauver, supra*, 88 N.J. at 191-440 A.2d at 1131 (quoting Executive Order No. 106 (Byrne)). Second, the County has an interest in "effectively managing the detention facility," even though, as the third-party complaint discloses, in some respects this interest is distinct from and adverse to the State's interest in allocation of space. However, given that the State has invoked its interest in allocation of space to require the County to retain state prisoners, the County's effective management of the Jail must include management of the resultant overcrowded institution, and the two governmental interests to that extent coincide.

The district court was also correct in concluding that "the interests of local and state governments in not releasing onto the streets either pretrial detainees who are not bail worthy or convicted inmates, are legitimate ones." *Union County, supra*, 537 F. Supp. at 1003. *See Bell v. Wolfish*, supra, 441 U.S. 539-40.

Thus, the district court properly proceeded to consider whether the conditions and restrictions of the Jail were rationally connected to these valid objectives and whether the conditions and restrictions were excessive in relation to these objectives. *See Bell v. Wolfish, supra*, 441 U.S. at 538. The district court found that the overcrowding at the Jail was rationally connected to the ob-

jective of not releasing inmates. It also found that the conditions resulting from overcrowding were "an *unavoidable* incident of the jail officials' efforts to effectively manage the facility during a statewide prison overcrowding emergency." *Union County, supra*, 537 F. Supp. at 1002 (quoting the Special Master's Report). Thus, in effect, the district court found that the overcrowding was rationally connected to and served both state and county governmental interests. These findings are not questioned on this appeal.

C

The only question thus remaining in the *Bell* inquiry is whether the conditions and restrictions resulting from inmate overcrowding can be considered excessive in relation to the purposes assigned for them. *See Bell v. Wolfish*, supra, 441 U.S. at 538. In this connection, the Special Master, after discussion of the *Bell* standard, found

> The totality of the overcrowding conditions at the jail, e.g., the unsuitable and unsanitary sleeping conditions resulting from inmates being forced to sleep on mattresses, the almost complete absence of recreational facilities, the cutbacks in visitation, the delays encountered in administering inmate programs, the inadequate lighting in the cellblocks, the inability to provide clean inmate clothing in accordance with N.J.A.C. 10A:31-3.13(b)(5), and the absence of a medical screening procedure for new inmates, amount to "genuine privations and hardship."

App. 81a-82a.

The Special Master recommended that the court hold that these privations and hardships "cannot be justified by the mere fact that a statewide prison overcrowding problem exists." App. 82a. The Special Master also

recommended that the court hold that each of six specific conditions at the Jail constituted punishment,[11] when considered in the light of the totality of the circumstances at the Jail. App. 82a-83a.

By the terms of the order appointing the Special Master, the parties were given ten days after the filing of his report to file objections to that report. The County filed no objections, and neither did the inmates. The Commissioner did file objections, which focussed largely on the Special Master's refusal to accept certain remedial recommendations of the Department of Corrections. *See* App. 100a-101a. The Commissioner specifically noted that "[t]he State does not assert that it is proper for the County to require inmates to sleep on mattresses on the floor. . . . So the Special Master properly recommended that the floor mattresses practice should be eliminated." App. 122a.

At a hearing which was held on March 25, 1982, the district court considered the Commissioner's objections. The Attorney General, representing the Commissioner, argued that double bunking combined with measures promised by the County would cure any constitutional violations, and that the State needed more time to absorb

---

11 These six conditions were:

(1) housing two, three, four or more inmates in detention cells without adequate sleeping arrangements, for more than a few days;

(2) requiring detainees to sleep on mattresses laid adjacent to toilets in single cells, for more than a few days;

(3) requiring detainees to sleep on mattresses laid on the floor in other parts of the Jail, for more than a few days;

(4) requiring detainees to wear the same clothing for several weeks, in violation of N.J.A.C. 10A:31-3.13;

(5) failing to screen new inmates for communicable diseases;

(6) depriving detainees of any meaningful opportunity for recreation.

App. 82a-83a.

any state prisoners to be transferred.[12] The State's position was that, if, as the Commissioner proposed, inmates were double bunked, adequate space and recreational facilities would be afforded. In that manner, the constitutional standard of *Bell v. Wolfish* would be satisfied.[13]

From these rather extended proceedings, which culminated in the district court's order of April 27, 1982, two conclusions emerge. First, from the positions taken by the County and the Commissioner, we do not understand either of them seriously to contest the unconstitutionality, in the context of overcrowded conditions, of forcing pre-trial detainees to sleep for more than a few days on mattresses placed on the floor of a 5' x 7' cell adjacent to an open toilet which both cellmates must use. Indeed, the County conceded, at oral argument before this court, that conditions as found by Justice Mountain were unconstitutional. Thus, the district court's implicit holding that conditions as found by the Special Master are "excessive in relation to the purposes assigned to them," is not questioned on this appeal.

Our second conclusion is that, of all the various conditions challenged as being unconstitutional, the most significant, and indeed the only condition not meeting constitutional standards, was the practice of placing a mattress on the floor for the second occupant of a cell

---

12 We understand the term "double-celling" to mean the confinement of two inmates in a single general population cell, whatever accommodations may be provided. We understand the term "double-bunking" to mean the confinement of two inmates in a single general population cell, with each inmate being provided with a permanent bunk-type bed of his own. The Commissioner has suggested that the second bunk might be fastened to the cell wall above the first bunk, "with a hinge mechanism in order that the top bunk can be raised vertically until it rests against the cell wall," when not in use. App. 256a.

13 The State of New Jersey asked that the district court order the County to follow the Commissioner's recommendation to double-bunk the general population cells, and to reconvert the temporary dormitories to additional recreational areas. App. 195a.

designed for but one inmate. It is not surprising, therefore, that the Commissioner focussed on an alleviation of this latter condition by recommending double-bunking in such cells. The Commissioner contended that if, by providing double bunks, and by holding the County to its obligations under the consent agreement, constitutional objections to overcrowding could be overcome, then the Commissioner's discretion in determining where state prisoners should be placed, should not be overridden. We therefore turn to a consideration of the two-in-a-cell or double-bunking practice, as resolution of that issue will determine the outcome of this appeal.

D.

The district court held, first, that "based solely on considerations of space . . . double-bunking at the [Jail] subjects pretrial detainees to genuine hardships amounting to punishment." *Union County, supra*, 537 F. Supp. at 1005, and, second, that, under the totality of circumstances at the Jail, double-bunking violates the due process rights of pretrial detainees. *Id.* at 1006-07.

The Commissioner argued that, if the general population cells in Jail were equipped with double bunks, then both the unconstitutional accommodations and the lack of recreational space would be remedied. App. 178a-79a. The Commissioner emphasized that even at the highest recorded population figure for the Jail less than three quarters of the 218 general population cells would have to be double-bunked,[14] and the district court

---

14 This calculation assumed that the "detention cells could hold two inmates each, the 15 intake area cells could hold one inmate each, and the work release trustee dorms could hold 26 inmates." The record reveals that the highest recorded population figure for the Jail was 385 inmates. App. 188a. The Commissioner erroneously concluded that in order for the 322 inmates (those remaining after 63 had been accommodated in the detention, intake and work release areas) to be placed in the 218 general popula-

assumed that one-half of the cells would need to be double-bunked. *Union County, supra*, 537 F. Supp. at 1005. The Commissioner noted that if this were done the temporary dormitories could be removed from the former recreational areas, resulting in more than doubling the areas available for recreation. App. 190a. Finally, the Commissioner contended that the County could provide clean clothing weekly and medically screen all new inmates, even with the increased population resulting from double-bunking. App. 192a-93a.[15] At oral argument before this court, the County contended that it had implemented an adequate medical screening program and that it had undertaken to procure supplies necessary for meeting the requirement for clean clothes. Thus, it would appear that the Commissioner's contention, that the County could provide clean clothes and medical screening, even with double bunking, is well founded and not opposed by the County.

---

cells it would be necessary for 161 of these cells to be double-celled. *Id.* In fact, at that population figure, only 104 of the general population cells would need to be double celled (thus holding 208 inmates), and the remaining 114 inmates could be placed singly in the remaining 114 cells. Thus, at a population figure of 385, slightly less than half of the general population cells would have to be double-bunked. The district court was, therefore, roughly correct in figuring the spatial impact of double-bunking on the assumption that one-half of the general population cells would need to be double-bunked.

15. Indeed, at the March 25, 1982 hearing the County contended that it was able to provide clean clothes weekly to the inmates then at a population figure of 362. Transcript of Proceedings at 58-60. The County contended, however, that due to the "population explosion" it was unable to give all new inmates a complete physical check-up before putting them into the general population. *Id.* at 57-58. It should be noted, however, that the district court, in its order of April 27, 1982, required the County, pursuant to the consent judgment, to "implement a medical screening program for new admittees" and "to provide clean clothing weekly and clean towels daily." *Union County, supra*, 537 F. Supp. at 1015. The County did not appeal this order.

However, as noted, the district court rejected this remedial scheme put forth by the Commissioner on two separate grounds, first, that conditions would still violate the due process rights of detainees because of sheer lack of space, and second, that conditions would still violate their rights when the totality of circumstances in the Jail was considered. *Union County, supra*, 537 F. Supp. at 1005-07. We will consider these grounds in succession.

The record reveals that, even when double-bunked, the admittedly rather small cells at the Jail provide adequate space for sleeping, and thus, in the words of Justice Rehnquist in *Bell v. Wolfish*, "we fail to understand the emphasis of [the district court] on the amount of walking space in the 'double-bunked' rooms." *Bell v. Wolfish, supra*, 441 U.S. at 543 n.26.

With respect to the space available outside the cells the County was ordered to "provide at least one hour of recreation daily to each inmate." *Union County, supra*, 537 F. Supp. at 1015. Moreover, on the assumption that cells would be double-bunked, the former recreation areas were to be reclaimed. Based on the Special Master's finding, this reconstituted recreation area would be over 1,700 square feet in area. App. 68a, 89a. Thus, for at least one hour daily, inmates would have the use of an enlarged space. As for the space available to inmates during the remaining waking hours, the Special Master calculated that the square footage available per inmate, when one-half of each tier of cells is double-bunked, would vary from 41 to 45 square feet, depending on the number of cells. App. 72a. When, as has been done on several tiers of the Jail, for reasons not explained in the record, the entire tier has been double-celled, the available square footage per inmate (including his share of his own cell) varies from 31 to 33.5 square feet. *Id.* This is indeed a "cramped and overcrowded" space, App. 84a (Special Master's description), and very far from ideal. Yet the mitigating effects of larger recreational space for

at least an hour a day must also be recognized. *See Bell v. Wolfish, supra*, 441 U.S. at 543.

With the adoption of these recommendations, it is apparent that inmates would have adequate room for sleeping and a genuine opportunity for at least an hour of recreation. In this light, we find the spatial analysis employed by the district court unilluminating and unconvincing. It may be that confining detainees to a small space for much of the time could amount to "punishment," but if so, such a conclusion must be based on a qualitative and not a quantitative assessment of the resulting environment. Thus, for this reason we reject the district court's holding of unconstitutional conditions "based solely on considerations of space." *Union County, supra*, 537 F. Supp. at 1005.

E.

We proceed, therefore, to consider whether, under the totality of circumstances at the Jail as it would be under the Commissioner's proposed solution, overcrowding would be deemed to amount to punishment.[16] We recognize that this question is not an easy one, for although the Supreme Court held that, under the circumstances described in *Bell v. Wolfish*, "nothing even approaching [the degree of hardship which would 'raise serious questions under the Due Process Clause'] is shown." *Bell v. Wolfish, supra*, 441 U.S. at 542, conditions at the Jail are evidently much worse than at the relatively spacious and modern facility in question in *Bell*. Focussing, however, upon the crucial constitutional findings of the Special

16. Because "[t]he restriction or condition at issue in this litigation is the severe overcrowding of the facility and the impact of the excess population on the provision of services and programs." *Union County*, 537 F. Supp. at 1002, we agree that the district court was correct to weigh the "excessiveness" of assigned state purposes in light of the totality of circumstances which had in fact resulted from the overcrowding situation.

Master, we are convinced that overall the remedial scheme proposed by the Commissioner passes constitutional muster.

First, and most importantly, providing double bunks will avoid the unsanitary and humiliating practice of forcing detainees to sleep on mattresses placed either on the floor adjacent to the toilet and at the feet of their cellmates, or elsewhere in the Jail. Second, double-bunking will avoid the practice of having more than two detainees without adequate sleeping arrangements in the detention cells. Third, double-bunking will make it possible for recreational areas at the Jail to be cleared and dedicated to their original function. Thus, the remedial scheme put forth by the Commissioner, combining double-bunking with discharge of the County's obligations under the consent judgment, would effectively cure all of the conditions that were of particular concern to the Special Master.[17] Moreover, our own review of the record convinces us that pre-trial detainees are confined at the Jail "for generally a maximum period of 60 days." *Bell v. Wolfish, supra*, 441 U.S. at 543.[18]

---

17 An undesirable condition remaining would be the admittedly cramped and overcrowded nature of the space in which detainees are confined. To a considerable extent this lack of space will be mitigated by the promised daily hour of recreation, by promised visitation, and by other programs which the Jail provides and which enable detainees to be away from their cellblocks for some two hours a week. App. 12a (complaint ¶ 26); 17a (answer, admitting ¶ 26 of complaint).

18 An analysis of the Jail list as of January 11, 1982, submitted and relied upon by counsel for the inmates, shows 10 inmates awaiting disposition of charges before municipal courts, 103 inmates awaiting disposition of charges before grand juries, 96 inmates awaiting trial on state charges, and 18 inmates adjudged guilty and awaiting sentencing on state charges. None of the 113 inmates awaiting either disposition of municipal charges or action by grand juries had been confined for more than 60 days. Fifty-five of the 96 inmates awaiting trial on state charges had been confined for more than 60 days. Thus, of the 209 inmates who had not been

Thus, although the question is not without difficulty, we are satisfied that, if the Commissioner's proposals, described above, were fully implemented, conditions at the Jail would pass constitutional muster. *Bell v. Wolfish*, *supra*, 441 U.S. at 541-43.

V.

Sentenced Inmates

A.

In *Rhodes v. Chapman*, 452 U.S. 337 (1981) the Supreme Court considered "for the first time the limitation that the Eighth Amendment . . . imposes upon the conditions in which a State may confine those convicted of crimes." *Rhodes v. Chapman*, *supra*, 452 U.S. at 344-45. The Court stated that

> No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

Rhodes v. Chapman, *supra*, 452 U.S. at 346. The Court went on to emphasize that Eighth Amendment "'judgment[s] should be informed by objective factors to the maximum possible extent.'" *Rhodes v. Chapman*, *supra*, 452 U.S. at 346 (quoting *Rummel v. Estelle*, *supra*, at 274-275, which quoted *Coker v. Georgia*, *supra*, at 592 (plurality opinion)).

---

found guilty of any charge, only 55 or 26% had been confined for more than 60 days. Only 39 or 19% had been confined more than 75 days. Thus, of those detainees confined at the Jail on January 11, 1982, about three-quarters had been confined for less than 60 days. The record does not indicate the percentage of those detained prior to conviction who are released within 60 days of being committed to the Jail. Cf. *Bell v. Wolfish*, *supra*, 441 U.S. at 524 n.3.

Noting that the same principles apply "when the conditions of confinement compose the punishment at issue," *Rhodes v. Chapman, supra*, 452 U.S. at 347, the Court went on to characterize the circumstances under which such conditions might be held to constitute cruel and unusual punishment:

> Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . In *Hutto v. Finney*, 437 U.S. 678 (1978), the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they *resulted in unquestioned and serious deprivations of basic human needs*. Conditions other than those in *Gamble* and *Hutto*, alone or in combination, *may deprive inmates of the minimal civilized measure of life's necessities*. Such conditions could be cruel and unusual under *the contemporary standard of decency* that we recognized in *Gamble*, 429 U.S. at 103-104. But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.
>
> *Rhodes v. Chapman, supra*, 452 U.S. at 347 (emphasis added).

B.

In the present case, the Special Master recommended that the district court hold conditions at the Jail to be in violation of the Eighth Amendment in two respects.[19]

---

19. With respect to the "basic human needs" recognized by Eighth Amendment cases, *see, e.g., Rhodes v. Chapman, supra*, 452 U.S. at 348-49 (food, medical care, sanitation, security); *Hutto v. Finney*, 437 U.S. 678, 681-83 (sanitation, clothing, security, food), the Special Master's findings were generally favorable to defendants.

He opined, first, that requiring two or more sentenced inmates to sleep for extended periods on mattresses laid on the floor of the detention cells amounts to "wanton and unnecessary punishment,"[20] and, second, that requiring sentenced inmates to sleep on mattresses placed on the floor "is so reprehensible and dehumanizing a practice when carried out for extended periods of time" that it violates the Eighth Amendment by inflicting " 'unnecessary and wanton' physiological and psychological pain." App. 87a-88a.

The district court also held that requiring sentenced inmates to sleep for long periods of time on mattresses placed on the floor was "a 'reprehensible and dehumanizing practice.' " Not following the Special Master's legal analysis, however, it went on to hold that such a practice "deprives these inmates of the essential requirement of habitable shelter," and that in consequence this practice violates the Eighth Amendment. *Union County, supra*, 537 F. Supp. at 1008.

Going further, however, the district court also held "that 30 square feet of daytime space or 19.5 square feet of sleeping space fails to meet any contemporary standard of decency especially in light of the impact overcrowding has had on visitation, recreation, and time off the tier." Id.[21] In consequence, the district court held that conditions even under the Commissioner's remedial scheme involving double-bunking, would constitute

---

20 He did not, however, regard it as unconstitutional to house two sentenced inmates in a single detention cell for substantial periods "if the cells were equipped with two suitable beds." App. 87a n. 17.

21 The district court did, however, agree with the Special Master that the detention isolation cells could constitutionally accommodate two persons if beds were provided. *Union County, supra*, 537 F. Supp. at 1008.

cruel and unusual punishment. *Id.* at 1008-09. We do not agree.

C.

Here, as in the case of the pre-trial detainees, the Commissioner did not defend the constitutionality of forcing sentenced inmates to sleep on mattresses laid on the floor next to toilets. Rather, the Commissioner argued, without qualification, that the court should "direct the County to follow the recommendations of the Department to use bunk type beds in the general population cells and detention cells and thereby eliminate the use of floor mattresses in the jail." App. 195a. Similarly, on this appeal, the Commissioner, implicitly conceding the undesirability of placing mattresses on the floor, attacks only the further holding of the district court, that even double-bunking at the Jail would violate the Eighth Amendment, and argues that the district court erred by so holding on the basis of spatial considerations alone. *See* Appt. brief 18-19.

Having sustained the constitutionality of the Commissioner's remedial scheme, involving double-bunking and the County's obligations under the consent judgment with respect to pretrial detainees, *a fortiori*, we must hold that the same provisions meet constitutional standards for sentenced inmates, under the principles of *Rhodes v. Chapman*. *See Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) (if Eighth Amendment standard violated, due process standard applicable to pre-trial detainees must also be violated). *See also Gibson v. Lynch*, 652 F.2d 348, 352 (3d Cir. 1981). Nevertheless, recognizing that the district court was faced with the necessity of grappling with a different constitutional standard in the context of sentenced inmates, we deem it appropriate briefly to consider the district court's holding with regard to the "minimal civilized measure" of "habitable shelter" under the

Eighth Amendment. *Union County*, 537 F. Supp at 1008.

I.

The district court, relying upon *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977) and *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), rested its holding with regard to the basic necessity of "shelter" solely upon the following consideration:

> the stark reality is that 30 square feet of daytime space or 19.5 square feet of sleeping space fails to meet any contemporary standard of decency especially in light of the impact overcrowding has had on visitation, recreation and time off the tier.

Union County, supra, 537 F. Supp. at 1008.

The test which we must apply in reviewing the district court's determination that sentenced inmates would be subjected to cruel and unusual punishment under the Commissioner's double-bunking proposal is whether the resulting "conditions . . . . alone or in combination, [ ] deprive inmates of the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. at 347. The "necessity" of which the inmates were held to be deprived in this case is the necessity of "habitable shelter," as measured under "contemporary standards of decency."[22] *Union County, supra*, 537 F. Supp. at 1008. The totality of circumstances relevant to

---

22 We note that the Supreme Court has emphasized time and again "that 'Eighth Amendment judgments should neither be nor appear to be merely the subjective views' of judges." *Rhodes v. Chapman*, 452 U.S. at 346 (quoting Rummel v. Estelle, 445 U.S. 263, 275 (1980)). *See also* Solem v. Helm, ___ U.S. ___, 51 U.S.L.W. 5019, 5023-24 (1983). Among the "objective indicia" of contemporary standards of decency to which the Court has looked are "history, the action of state legislatures, and the sentencing by

this inquiry comprises all those circumstances that bear on the nature of the *shelter* afforded to sentenced inmates. *See Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1982).[23] We believe that, just as the district court in *Hoptowit* erred, in this case the district court has also erred by "rely[ing] exclusively on per capita square footage recommendations." In doing so, it failed to consider the totality of the circumstances relevant to determining whether conditions have fallen to the "level at which the shelter of inmates is unfit for human habitation." *Hoptowit v. Ray*, 682 F.2d at 1249.[24] Rather, the district court here, relying upon the holding of the Tenth Circuit in *Battle*, *supra*, held that "30 square feet of daytime space or 19.5 square feet of sleeping space" was consti-

---

NOTE — *Continued*

juries" as well as basic background facts about the relation between inmates and prison authorities. *Rhodes v. Chapman*, 452 U.S. at 346-47. Because neither the Special Master nor the district court refers us to such factors, their conclusions undeniably "appear to be merely the subjective views of [these] judges." *See Rhodes v. Chapman*, 452 U.S. at 346.

23. The Ninth Circuit in Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982), applied the analysis adopted previously in Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981) ("a court should examine each challenged condition of confinement, such as the adequacy of the quarters, food, medical care, etc. . . . any condition of confinement which passes this test is immune from federal intervention."). *See also* Ruiz v. Estelle, 679 F.2d 1115, 1139 n.98 (5th Cir. 1982).

24. In *Hoptowit*, supra, the district court, evaluating conditions in the Washington state penitentiary, simply constitutionalized the minimum standards for space set out by the American Correctional Association. Although the district court had also found high levels of violence and deficiencies in medical care at the penitentiary, the court of appeals remanded for further findings as to what conditions had resulted from the overcrowding. In particular, the court directed findings as to how much time per day inmates spent in their cells, whether increased violence was out of proportion to the increase in population, and what effect overcrowding had had on other constitutionally required services. 682 F.2d at 1248-49.

tutionally inadequate as shelter. *Union County*, 537 F. Supp. at 1008.[25] Yet even the apparently *per se* rule requiring 60 square feet per inmate, adopted by the Tenth Circuit in *Battle*, 564 F.2d at 395, was adopted as a necessary remedial measure in the face of long-continued conditions of confinement that were plainly much worse than those facing inmates at the Jail.[26]

In the instant case, the district court failed to consider that the sentenced inmates spend much less time at the Jail than did the prisoners in question in *Rhodes*, "67% of whom were serving life or other long-term sentences." *Rhodes v. Chapman*, *supra*, 452 U.S. at 341.[27] Yet, as the Supreme Court, and the courts of appeal have repeatedly recognized in Eighth Amendment chal-

---

25. We do not regard the district court's inquiry as adequate to support his conclusion that conditions at the Jail are such as to "cause [inmates'] degeneration or threaten [their] mental and physical well-being." Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977). The cramped and unpleasant conditions at the Jail pale by comparison to conditions in the Oklahoma penal facilities in question in *Battle*, in which inmates, confined in facilities devastated by riots, were deprived of physical security, medical care, access to the courts, and other constitutional rights. Thus, even if we were to adopt the standard employed in *Battle*, and we do not, we would still hold that under the totality of conditions at the Jail sentenced inmates have not been deprived of "habitable shelter."

26. We note, further, that the emphasis in the *Battle* case and in Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied* 450 U.S. 1041 (1981), on the amount of space required to provide a *rehabilitative* environment, is in any case weakened as precedent after *Rhodes*. See Ativeh v. Capps, 449 U.S. 1312, 1316 (1981) (Rehnquist, J. opinion in chambers) (granting stay of district court order pending decision of *Rhodes*) (criticizing, *inter alia*, district court's emphasis on rehabilitative qualities of prison environment); *Rhodes v. Chapman*, 452 U.S. at 348-49 (Powell, J. for the Court):

> We would have to wrench the Eighth Amendment from its language and history to hold that delay of these desirable aids to rehabilitation violates the Constitution

27. The Special Master found that on February 15, 1982, 81 of the 359 inmates of the Jail were awaiting transfer to state prisons, and that 57 of these 81 had been at the Jail for at least 75 days. App.

lenges, "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." *Hutto v. Finney*, 437 U.S. 678, 686 (1978).

2.

Further, the overall length of confinement is only one factor among several that must be considered by a district court, in evaluating the totality of circumstances relevant to any alleged constitutional deficiency in shelter. "Neither the number of inmates in one cell nor the amount of space provided for an inmate in a dormitory alone determines whether confinement is cruel and unusual." *Ruiz v. Estelle*, 679 F.2d 1115, 1146 (5th Cir. 1982). Also relevant is how much time prisoners must spend in their cells each day,[28] *see Hoptowit v. Ray*, 682 F.2d at 1249, the opportunities for inmate activities out-

---

NOTE — (Continued)

69a-70a. He made no further findings as to exactly how long these 57 had been at the Jail, or as to how long state prisoners typically spent at the Jail before transfer. It should also be noted that, after transfer to state prison, state prisoners will generally be afforded cells of their own, be allowed to have more personal items in their possession, and be provided with a wider range of services and facilities than the Jail offers. The Commissioner defended his decision that county facilities rather than state prisons should be double-celled on the grounds that state prisoners are generally "an aggressive and assaultive type of population" who will be confined for much longer, thus making it necessary "to relieve a lot of pressures." App. 189a-90a (Commissioner's Supplemental Brief on Double Bunking).

It should also be remembered that, in addition to state prisoners, there are in the Jail county prisoners, who are being held for the serving of shorter sentences. The Special Master made no findings as to the typical length of stay for county prisoners. The jail list for January 11, 1982 showed 28 county prisoners, with sentences ranging from 30 days to nine months, the majority being in the three to six month range.

28. As we concluded previously, the admittedly small cells

side of the cells,[29] and the general state of repair and function of the facilities provided.[30]

"provide more than adequate space for sleeping." *Bell v. Wolfish*, 441 U.S. at 543. As the Special Master found, the inmates "are locked in their cells between 10 p.m. and 6 a.m." and "at all other times of the day they are permitted access to the cell corridor." App. 67a. The cell corridor is "approximately 5 1/2 feet wide and varies in length from 40 feet to 70 feet depending upon the number of cells in a given tier," *id.*, and "[e]ach cell corridor is equipped with one television set and one telephone." App. 67a-68a.

29. On a twelve-cell tier that was completely double-celled (as it appears that some were), inmates would for most of the day have a choice between remaining in their cells or sharing a 5 and 1/2 by 60 foot space with their twenty-three cellblock mates. Although this common area is not spacious, it does provide adequate space for such exercises as push-ups, sit-ups, and even walking.

The remedial scheme proposed by the Commissioner contemplated that the former recreation areas, measuring over 1700 square feet, would be cleared and rededicated to their original use. The district court, pursuant to the consent judgment, also ordered the County to "provide at least one hour of recreation daily to each inmate," and to "reinstitute a program of at least three one-quarter hour visitation periods per week." *Union County*, 537 F. Supp. at 1015. Further, the inmates themselves alleged, in their complaint, that inmates who choose to avail themselves of "counselling programs, chapel, educational activities, and related programs ... may be away from their cellblocks for perhaps an additional two hours per week." App. 12a. Thus, under the Commissioner's proposal, inmates may be away from the admittedly crowded cellblock for some ten hours per week, including seven hours of opportunity for exercise in the enlarged recreational space.

30. In this case, in contrast to other cases in which federal courts have found prison conditions unconstitutional, there has been no finding that basic physical facilities such as plumbing, heating, ventilation, and showers are inadequate. Although the Special Master characterized the Jail as "an aging eight story detention facility located in the heart of Elizabeth, New Jersey," App. 66a, it does not appear from the record that the Jail has been allowed to fall into disrepair in these basic respects. This fact is significant both because it indicates a good faith effort on the part of the County to maintain the facility, and because denial of such basic physical amenities, and the consequent effect on sanitation and health, go to the heart of what is meant by "habitable shelter" for Eighth Amend-

3.

We therefore conclude that the district court erred in holding conditions at the Jail, as they would be if the double-bunking remedial scheme proposed by the Commissioner were adopted, to be in violation of the Eighth Amendment. If sentenced inmates were double-celled and provided with bunk-type beds of their own, and if the County discharged its duties under the consent judgment, as it was obliged to do, then there can be no doubt that the resulting conditions would not "deprive inmates of the minimal civilized measure of" shelter. *Rhodes v. Chapman*, 452 U.S. at 347.

VI.

Remedy

"Although a district court has wide discretion in tailoring a remedial injunction, that discretion is not unconfined." *Ruiz v. Estelle*, 679 F.2d at 1144-45. The Supreme Court and the courts of appeal have articulated several limiting principles that must guide the district court in fashioning appropriate relief.

First, and perhaps most importantly, the Eighth Amendment does not give a federal court "a roving commission to impose upon the [correctional institutions of New Jersey its] own notions of enlightened policy." *Rummel v. Estelle*, 445 U.S. 263, 285 (Stewart, J., concurring) (1980). Rather, " 'the nature of the violation determines the scope of the remedy.' Therefore, a court can order only relief sufficient to correct the violation

---

NOTE — (Continued)

ment purposes. In those cases where federal courts have found unconstitutional prison conditions, a decaying physical plant allowed by disrepair to become virtually inoperable has almost always provided an important background element. *See, e.g., Ramos v. Lamm*, *supra*; *Battle v. Anderson*, *supra*.

found." *Ruiz v. Estelle*, 679 F.2d at 1145 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Neither may the court "use the totality of all conditions to justify federal intervention requiring remedies more extensive than are required to correct Eighth Amendment violations." *Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981).

Second, "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). What this means in practice is that "state and local authorities have primary responsibility for curing constitutional violations." *Hutto v. Finney*, 432 U.S. at 687 n.9. It is when these " 'authorities fail in their affirmative obligations . . . [that] judicial authority may be invoked.' " *Hutto v. Finney*, 432 U.S. at 687 n.9 (quoting *Milliken v. Bradley*, 433 U.S. at 281).

A.

The district court in this case ordered the Commissioner "to remove any and all inmates incarcerated at the Union County Jail who as of fifteen (15) days prior to that date [July 1, 1982] have been sentenced to terms of imprisonment in state facilities; and . . . fully [to] comply with N.J.S.A. 2C:43-10(e) [providing for removal of state prisoners within fifteen days of sentencing] with respect to persons who are or shall be incarcerated at the Union County Jail." *Union County*, 537 F. Supp. at 1015.

This order is in express contravention of Executive Orders, issued by Governors Byrne and Kean, that suspend operation of N.J. Stat. Ann. 2C:43-10(e) (West 1982) and confer upon the Commissioner discretion to designate the place of confinement for state prisoners. Relying upon its authority under the Fourteenth and Eighth Amendment and the Supremacy Clause, however, the district court held that

> [t]he administrative action designating the UCJ as the place of confinement of state sentenced inmates is void and N.J.S.A. 2C:43-10(e) shall be given full force and effect.

Union County, 537 F. Supp. at 1009. This holding is based, in turn, upon the district court's conclusion that conditions in the Jail would violate the Fourteenth and Eighth Amendments even if the double-bunking scheme proposed by the Commissioner were implemented. For, only if conditions in the Jail could not be rendered constitutional without reduction of the population, would removal of the state prisoners be required as a constitutional remedy.

We have concluded, however, that the district court erred when it held that the Commissioner's remedial scheme, if implemented by the County and the State, would not cure existing Fourteenth and Eighth Amendment violations. Thus, the crucial constitutional predicate for the court's order is lacking.

The Commissioner, in the exercise of his "primary responsibility for curing constitutional violations," *Hutto v. Finney*, 437 U.S. at 687 n.9, has in due course and in evident good faith come forward at the earliest opportunity with a remedial scheme to cure the violations found by the Special Master. Under the governing standards of *Bell v. Wolfish* and *Rhodes v. Chapman*, the Commissioner's recommendation, once implemented, would cure the due process and Eighth Amendment violations that have been found to exist in the Jail. This is not, therefore, a case in which "[t]he District Court had given the [Commissioner] repeated opportunities to remedy the [unconstitutional] conditions in the . . . cells." *Hutto v. Finney*, 437 U.S. at 687.

B.

It has been argued in support of the district court's order that the remedy ordered by the district court is actually less intrusive than the recommendations made by

the Commissioner. Brief of Plaintiffs-Appellees at 50-52. This is said to be so because a single order to remove an easily identifiable group of inmates may be carried out with less interference in administration of day-to-day operation of the Jail than would be required to implement the double-bunking scheme urged by the Commissioner. We emphasize, however, that the intrusiveness of an order cannot be assessed apart from its impact on the state authorities involved. There can be no question, in light of the fundamental "interests of state and local authorities in managing their own affairs," *Milliken v. Bradley*, 433 U.S. at 281, that a constitutionally adequate remedial scheme developed by the responsible officials and carried out within the context of existing state institutional structures, would be far less intrusive than a remedy imposed on those officials against their own administrative judgment by means of the abrogation of state institutional arrangements.

VII.

We therefore hold that the district court, in its zeal to correct what it perceived as unconscionable conditions, improperly exercised its discretion by rejecting the Commissioner's proposed remedial scheme and by ordering the removal of state prisoners from the county facility. Accordingly, we will reverse and remand this case to the district court with the following directions, with regard to the district court's order of April 27, 1982. *Union County*, 537 F. Supp. at 1014-15. The district court is directed:

I. To vacate paragraph (1) (ordering removal of state prisoners by July 1, 1982); and

II. To vacate paragraph (2) (ordering compliance with N.J. Stat. Ann. 2C:43-10(e) (West 1982) despite suspension of this fifteen-day removal provision by Executive Order); and

III. To vacate paragraph (f) (confirming the "maximum capacity" for the Jail), paragraph (g) (giving the

Commissioner until July 1, 1982 to achieve that population figure), and paragraph (h) (empowering the County to "notify the Department of Corrections to remove any state prisoners who have remained at the facility beyond the statutory fifteen (15) day period since sentence was imposed") of the October 22, 1981 consent judgment, which paragraphs are incorporated into and made part of the April 27, 1982 order. *Union County*, 537 F. Supp. at 1015.

As for the remaining portions of the April 27, 1982 order, we will remand to the district court for reconsideration and modification, if necessary, in light of our foregoing discussion, and for such other proceedings as are consistent with this opinion. We point out as well that, because changes not reflected in the record before us may have occurred in the time that has elapsed since the district court entered its April 27, 1982 order, the district court, if in its discretion it should deem necessary, should not regard itself as precluded by this opinion from supplementing the record. In particular, the court may wish to develop further the manner, and time, in which the Commissioner's remedial proposals are to be implemented, and may itself take any other steps it deems necessary to require compliance with the constitutional mandates of *Bell* and *Rhodes* as we have construed them in this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts, The Legal Intelligencer, Phila., Pa.)

Filed on August 11, 1983.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5310

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated

v.

V. WILLIAM DI BUONO, Assignment Judge; JOSEPH G. BARBIERI, Criminal Assignment Judge; CUDDIE E. DAVIDSON, JR., Bail Judge; as Representatives of the Judges of the Criminal Court of Union County; RALPH FROELICH, Union County Sheriff; JAMES SCANLON, Jail Administrator; THOMAS JEFFERSON, Jail Warden; ROSE MARIE SINNOT, Chairman, Board of Chosen Freeholders; GEORGE ALBANESE, County Manager; and their Successors in Office, in their official capacities, Randolph Pisane and Louis J. Coletti

v.

William H. FAUVER, Commissioner, Department of Corrections, State of New Jersey, and his Successor in his official capacity

William H. Fauver, Commissioner,
New Jersey Department of Corrections,
Appellant

(D.C. Civil No. 81-863)

APPENDIX E

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: HUNTER and GARTH, *Circuit Judges;* and WEBER, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on December 14, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered April 27, 1982, be, and the same is hereby reversed and the cause remanded to the said District Court with directions to vacate paragraphs (1) and (2) of its order entered April 27, 1982, and paragraphs (f), (g), and (h) of the consent judgment entered October 22, 1981, which paragraphs are incorporated into and made part of the April 27 order. It is further ordered and adjudged that as to the remaining portions of the April 27, 1982, order, the cause is remanded to the said District Court for such other proceedings as may be necessary, consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

Clerk

August 11, 1983

---

* Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Filed April 27, 1982.

UNION COUNTY JAIL INMATES,
Timmie Lee Barlow, et al., Plaintiffs,

v.

James SCANLON, Thomas Jefferson, etc. et al., Defendants,

v.

William H. FAUVER, Commissioner, Department of Corrections, Third-Party Defendant.

Civ. No. 81-863.

United States District Court,
D. New Jersey.

April 27, 1982.

In action involving overcrowded conditions at county jail, the District Court, Harold A. Ackerman, J., held that: (1) double bunking violated due process rights of pretrial detainees; (2) double bunking of sentenced inmates violated Eighth and Fourteenth Amendments; (3) state Governor's executive orders regarding confinement of state inmates were required under supremacy clause to yield as applied to county jail; and (4) facts supported capacity figure of 259 inmates.

Order accordingly.

1. Constitutional Law 262

Fifth and Fourteenth Amendments protect pretrial detainees from subjection to punishment without due process. U.S.C.A.Const.Amends. 5, 14.

2. Constitutional Law 270(1)
Criminal Law 1213

Eighth and Fourteenth Amendments protect sentenced persons from subjection to cruel and unusual punishment. U.S.C.A.Const.Amends. 8, 14.

APPENDIX F

3. Prisons 4(2)

Courts, while being sensitive to public desire to incarcerate criminals, must, when called upon, examine conditions of incarceration.

4. Federal Civil Procedure 1900

Findings of special master carry presumption of correctness. Fed.Rules Civ.Proc., Rule 53(e)(2), 28 U.S.C.A.

5. Federal Civil Procedure 1898

Burden is on objector to overcome presumption of correctness carried by findings of special master. Fed.Rules Civ.Proc., Rule 53(e)(2), 28 U.S.C.A.

6. Federal Civil Procedure 1900

Presumption of correctness of findings of special master does not apply to conclusions of law proposed by special master. Fed.Rules Civ.Proc., Rule 53(e)(2), 28 U.S.C.A.

7. Prisons 4(4)

Constitution requires different avenues of inquiry in evaluating conditions under which pretrial detainees and sentenced inmates may be confined.

8. Prisons 4(4)

Test to be applied to overcroweded conditions at county jail was whether they amounted to punishment of pretrial detainees; test would involve determination as to whether condition or restriction was imposed for purpose of punishment or whether it was but incident of some other legitimate governmental purpose.

9. Constitutional Law 272(2)

Use of floor mattresses in county jail constituted punishment without due process of law in contravention of rights of pretrial detainees. U.S.C.A.Const.Amends. 5, 14.

10. Constitutional Law 272(2)

Period of time during which inmate is subjected to general privation and hardship is relevant to due process inquiry; the clearer the hardship, the shorter the period of time before it raises serious question under due process clause. U.S.C.A.Const.Amends. 5, 14.

11. Prisons 17

Use of floor mattresses in general population cells, detention cells or other areas of county jail are permissible only during emergency and if no detainee is so confined for period longer than 48 to 72 hours.

12. Constitutional Law 262

Double bunking of pretrial detainees in county jail, whether by providing cells with spare mattresses or mattresses placed on frame, would subject such detainees to genuine hardships amounting to punishment in violation of Fourteenth Amendment where such double bunking would afford each detainee 19.5 square feet of spacing exclusive of furniture and fixtures for period of lockup at night, and such privation would be aggravated by overcrowded corridors and lack of meaningful recreation and other necessities. U.S.C.A.Const.Amend. 14.

13. Criminal Law 1213

Constitution does not protect convicted persons from all punishments, but only from cruel and unusual punishment. U.S.C.A.Const.Amends. 8, 14.

14. Prisons 4(2)

When conditions of prison confinement alone or in combination deprive inmates of minimal civilized measure of life's necessities and can be said to be cruel and unusual under contemporary statutes of decency, federal courts must discharge their duty to protect constitutional rights. U.S.C.A.Const.Amends. 8, 14.

15. Prisons 17

Conditions of overcrowding and double celling in county jail were not to be viewed in isolation, but provi-

sion of space was required to be viewed against totality of conditions.

16. Criminal Law 1213

Shelter is core area of concern under Eighth Amendment and goes beyond having solid roof over one's head. U.S.C.A.Const.Amend. 8.

17. Prisons 17

State must provide inmate with shelter that does not cause his degeneration or threaten his mental and physical well-being. U.S.C.A.Const.Amend. 8.

18. Prisons 17

Detention isolation cells in county jail could constitutionally accommodate two persons if each was provided with a bed, but practice of housing three or four inmates on mattresses on floor of such cells could not be countenanced. U.S.C.A.Const.Amend. 8.

19. Constitutional Law 272(2)
Criminal Law 1213

Double bunking of sentenced inmates in county jail, whether by providing cells with bare mattresses or mattresses on frames, would violate Eighth and Fourteenth Amendments where such double bunking would afford each inmate 19.5 square feet of space inclusive of furniture and fixtures for period of lockup at night and such privation would be aggravated by overcrowded corridors and lack of meaningful recreation and other necessities. U.S.C.A.Const.Amends. 8, 14.

20. Prisons 4(3)

In area of prison administration, judicial restraint is necessary in order to insure that business of operating state corrections system stays in hands of persons most able to accomplish such task.

21. Prisons 4(2)

It is solemn duty of federal district court to "scrupulously" observe whether there has been constitutional failing in challenged jail facility.

22. States 4.8

Where state Governor's executive orders regarding confinement of state inmates in county jails contributed substantially to unconstitutional situtation wherein environment at county jail was so degenerative and unhealthy as to be constitutionally impermissible, such executive orders as applied to such jail would yield under supremacy clause of Constitution and state statute mandating removal of state sentenced inmates from county jail within 15 days of sentencing would be given full force and effect. N.J.S.A. 2C:43-10, subd. e; U.S.C.A.Const.Art. 6, cl. 2.

23. Federal Civil Procedure 2397

On motion to set aside consent order, county had burden of proving that order was too burdensome under circumstances that had significantly changed since settlement was entered into. Fed.Rules Civ.Proc., Rule 60(b)(6), 28 U.S.C.A.

24. Prisons 4(3)

Since provision in consent order requiring county to close doors to county jail as "last-resort" measure was unnecessarily intrusive and disruptive, county was relieved from complying with such provision, but was directed to exhaust in good faith all other avenues of relief set forth in consent order and then to seek relief in federal district court. Fed.Rules Civ.Proc., Rule 60(b)(6), 28 U.S.C.A.

25. Prisons 17

Facts in action involving overcrowded conditions at county jail supported capacity figure of 259 inmates.

Stanley C. Van Ness, New Jersey Public Defender by T. Gary Mitchell, Trenton, N. J., for plaintiffs.

Robert C. Doherty, County Counsel, County of Union, Elizabeth, N. J., for defendants.

Irwin I. Kimmelman, Atty. Gen. of New Jersey by Joseph T. Maloney, Deputy Atty. Gen., Trenton, N. J., for third-party defendant.

OPINION

HAROLD A. ACKERMAN, District Judge.

It is no secret that crime is one of the most serious problems facing this country. People properly perceive it as a disease of epidemic proportions affecting the very well-being of society.[1] It is understandable that the public, acting through its appointed and elected representatives, has attempted to respond forcefully by apprehending, prosecuting, convicting, and in appropriate circumstances, incarcerating the perpetrators of crime.

Incarceration, especially for violent criminals, is increasingly considered to be the appropriate response to criminal behavior.[2] For this reason, the legislatures of

---

1. As reported by the Federal Bureau of investigation, *Uniform Crime Reports: Crime in the United States*, September 10, 1981, at 38:

> The volume of Crime Index offenses in 1980 increased 18 percent over 1976 figures and 55 percent abovve those for 1971 . . . . From 1976 to 1980, violent crimes were up 33 percent and property crimes rose 16 percent.

2. One very able spokesperson for this viewpoint is James Q. Wilson, *Thinking About Crime*, 172-73 (1975):

> [W]e would view the correctional system as having a very different function—namely, to isolate and to punish. It is a measure of our confusion that such a statement will strike many enlightened readers today as cruel, even barbaric. It is not. It is merely a recognition that society at a minimum must be able to protect itself from dangerous offenders and to impose some costs (other than the stigma and inconvenience of an ar-

many jurisdictions have reacted to this epidemic thorugh the passage of new laws significantly stiffening penalties to be meted out to offenders and adjusting parole guidelines. New Jersey is no exception. The new criminal code has already had an appreciable impact on the number and length of incarcerative sentences.[3]

As an inevitable consequence of this war on crime, there has been an enormous increase in the population of correctional facilities in this country.[4] Again, New Jersey is no exception.[5] The erection of new correctional facilities to accommodate the increased jail and prison populations has been urged by many responsible leaders including Chief Justice Warren E. Burger.[6] To date,

---

NOTE — (*Continued*)

rest and court appearance) on criminal acts; it is also a frank admission that society really does not know how to do much else.

The purpose of isolating—or, more accurately, closely supervising—offenders is obvious. Whatever they may do when they are released, they cannot harm society while confined or closely supervised. The gains from merely incapacitating convicted criminals may be very large. . . . If much or most serious crime is committed by repeaters, separating repeaters from the rest of society, even for relatively brief periods of time, may produce major reductions in crime rates.

3. 23% more incarcerative sentences were imposed during the first six months of 1981 than during the comparable period in 1980. Steelman, "Overcrowding in New Jersey: No Easy Answers to a Crisis in Corrections", National Council on Crime & Delinquency 16 (1981).

4. The National Institute of Justice reports that the number of persons confined for more than one year increased almost 50% between 1972-1978. 2 National Institute of Justice, American Prisons and Jails 11 (1980).

5. The population projections for the New Jersey prison complex show an increase of 38% from 1981 to 1982, and an increase of 150% from 1981 to 1985. By January 1990, 14,400 persons could be populating the state facilities.

6. After society has spent years and often a modest fortune to put just one person behind bars, we become bored. The media lose interest and the individual is forgotten. Our humanitarian concern

new construction has not kept pace with the demand for prison space.

[1-3] Institutions have become not just crowded but overcrowded. The reduced habitability of correctional facilities has in turn spawned a flood of lawsuits by prisoners in the federal courts.[7] The complaints alleging violations of the United States Constitution paint an egregious picture of the conditions of confinement in both state and federal institutions. The allegation implicate the Fifth and Fourteenth Amendments with respect to the confinement of those who stand accused but who are not free on bail (pretrial detainees). They raise Eighth and Fourteenth Amendment issues with respect to sentenced offenders. These amendments protect, respectively, pretrial detainees from subjection to punishment without due process, *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and sentenced persons from subjection to cruel and unusual punishment, *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). Courts, while being sensitive to the public desire to incarcerate criminals, must, when called upon, examine the conditions of incarceration because "people are sent to prison as punishment, not for punishment."[8]

NOTE — (*Continued*)

evaporates. In all but a minority of the states we confine the person in an overcrowded, understaffed institution with little or no library facilities, little if any educational program or vocational training. I have visited American prisons built more than 100 years ago for 800 prisoners, but with two thousand crowded today inside their ancient walls.

Remarks of Warren E. Burger, Annual Report to the American Bar Association (Feb. 8, 1981).

7. *See Rhodes v. Chapman*, 452 U.S. 337, 354 n.2, 101 S.Ct. 2392, 2395 n.2, 69 L.Ed.2d 59 (1981) (Brennan, J. concurring) *citing* 3 National Institute of Justice, American Prisons and Jails 34 (1980).

8. N.Y. Times, Mar. 25, 1982, § A, at 6, col. 1, quoting Frank W. Wood, Warden of Minnesota Correctional Facility in Oak Park Heights.

This action involves the overcrowded conditions at the Union County Jail ("UCJ"). The plaintiffs, represented by the New Jersey Public Defender,[9] brought suit a year ago against the Union County officials who administer the UCJ (hereinafter referred to collectively as the "County").[10] The County, alleging that the overcrowded condition of the UCJ is caused in whole or in part by the refusal of the New Jersey Department of Corrections to remove those UCJ inmates who have been sentenced to state prison terms, has impleaded as a third-party defendant, William H. Fauver, Commissioner of the Department of Corrections. Everyone agrees that the UCJ is overcrowded. The only issue in this case is whether the conditions in the jail have fallen below the standards constitutionally mandated. I find that they have.

PROCEDURAL HISTORY

This case has taken a unique procedural path. On October 22, 1981, the Public Defender and the County submitted to the Court for its approval a stipulation of settlement which provided, *inter alia*, for a population cap in the UCJ of 238.[11] The settlement was approved

---

9. The Office of Inmate Advocacy, counsel to the plaintiffs, was established as a part of the Office of the Public Defender. *N.J.S.A.* 52:27E-10. The Public Defender has discretion to decide what clients the Office of the Inmate Advocacy will represent. *N.J.S.A.* 52:27E-12.

10. The plaintiffs also included as defendants several judges of the New Jersey Superior Court. On August 5, 1981, the complaint was dismissed as against these defendants on the grounds that comity considerations precluded granting relief against judges who were not alleged to have directly and personally engaged in unconstitutional conduct. 519 F.Supp. 770 (D.N.J.1981).

11. The stipulation of settlement sets the maximum capacity of the jail at 238 and allows the County defendants 90 days in which to implement the agreement. The measures to be taken whenever the capacity is exceeded include notification to the county judiciary for review of bail status and sentences, notification to municipal po-

and entered into the record as a consent judgment. The third-party defendant was not a party to that settlement. Subsequently, the County sought a preliminary injunction compelling the Commissioner to withdraw immediately those UCJ inmates sentenced to state prison terms in order to enable the County to comply with the settlement agreement. In response to the request, the Commissioner moved to vacate the consent judgment asserting that the County was without the authority to have entered into it under the terms of Governor Byrne's Executive Orders Nos. 106 and 108, dated June 19, 1981 and September 11, 1981. Those Executive Orders declared a state of emergency in the State prison system due to overcrowding, suspended the operation of *N.J.S.A.* 2C:43-10(e) which mandated the removal of state sentenced inmates within 15 days of sentencing, and granted to the Commissioner authority to designate the place of confinement of any state or county inmate.

In order to avoid a potential confrontation between the state executive government and the federal judiciary, I stayed the hearing on the County's order to show cause and the Commissioner's motion to vacate the consent judgment. At that time, the appeal of a decision by the Appellate Division of the Superior Court of New Jersey upholding the Governor's orders was pending before the New Jersey Supreme Court. On January 6, 1982, the appeal was decided. *Worthington v. Fauver*, 88 N.J. 183, 440 A.2d 1128 (1982). In *Worthington*, Justice Pashman, writing for a unanimous court, held that the executive orders were a valid exercise of the power delegated to the Governor under the Civil Defense and Dis-

---

NOTE — (*Continued*)

lice agencies for retention of persons presently confined in the local lock-up facilities, notification to the Department of Corrections for removal of state sentenced inmates, and notification to this Court for a hearing. Pending a determination or other action to reduce the population, the jail administrators were required to refuse to admit persons brought to them.

aster Control Act. The Court also held that they did not violate the state constitutional doctrine of separation of powers, and that the Commissioner's action in designating the county jails as the place of confinement of state sentenced inmates currently housed there was not arbitrary or capricious.[12]

On January 20, 1982, counsel for all of the parties in this litigation were heard on the previously stayed motions, as well as on a motion made by the County to vacate the consent judgment, and on plaintiffs' motion that the County be found in contempt for failure to abide by the terms of the consent judgment. On January 29, 1982, I denied the third-party defendant's motion to vacate the consent order. Consideration of the other motions was deferred. At that time, I determined that a Special Master should be appointed pursuant to Fed.R. Civ.P. 53 to undertake a thorough examination of the conditions in the UCJ and to investigate the extent of the County's compliance with the consent judgment.[13] The Special Master, the Hon. Worrall F. Mountain, filed his report with the Court on February 26, 1982.[14] Objections were duly filed by the Commissioner and a hearing was held on March 25, 1982. I must now decide whether to accept, reject or modify the Special Master's report. Fed.R.Civ.P.53(e)(2). For the reasons which I will articulate *infra*, I have determined that his findings of fact should be adopted. I wil also accept, with certain specific modifications, the proposed conclusions of law. The

---

12. On January 20, 1982, Governor Kean, in one of his first acts in office, extended the emergency executive action for an additional four months. Executive Order No. 1.

13. See Appendix A *infra*.

14. Hon. Worrall F. Mountain is a retired justice of the New Jersey Supreme Court. He served on that bench from 1971 until his retirement in June of 1979. Justice Mountain recently participated as a member of Governor Byrne's Task Force on Prison Overcrowding. I wish to express my deep appreciation for his excellent service as Special Master in this matter.

remedy outlined by the Special Master will be followed in all material respects.

FINDINGS OF FACT OF SPECIAL MASTER

[4-6] Rule 53(e)(2) sets forth the standard of review to be applied to a master's findings of fact: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." *See also Kyriazi v. Western Electric Co.*, 647 F.2d 388, 396 (3d Cir. 1981). The findings of the Special Master therefore carry a presumption of correctness. The burden is on an objector to overcome that presumption. *See Halderman v. Pennhurst State School and Hospital*, 533 F.Supp. 661 (E.D.Pa.1982). However, such a presumption does not apply to the conclusion of law proposed by the Special Master. I may not abidicate my responsibility to make a legal determination as to the constitutional significance of the facts as found. *See Polin v. Dunn & Bradstreet, Inc.*, 634 F.2d 1319, 1321 (10th Cir. 1980).

The Special Master's findings of fact show the following: The UCJ is an aging eight-story facility located in the urban center of Elizabeth, New Jersey. As a county jail, it houses pretrial detainees and persons sentenced within the county to terms of less than one year. *N.J.S.A.* 2C:43—10(c). Persons sentenced to terms of one year or more normally may be housed at UCJ for up to 15 days before they are transferred to a state facility, but under the declared state of emergency, they are being housed at the UCJ until the Commissioner determines otherwise.

The daily population of the UCJ has averaged well over 300 inmates for the last several months. On February 8, 1982, the date the Special Master toured the facility, there were 350 inmates housed at the UCJ, of whom 92 were awaiting transfer to state prisons. On February 15, 1982, there were 359 inmates, of whom 81 were awaiting transfer. On February 24, 1982, the total population at the UCJ was 385, of whom 101 were

awaiting transfer to state facilities. At the hearing on the objections to the Special Master's report, counsel for the County defendants stated that the UCJ population as of March 24, 1982, was 362 inmates of whom 97 were state sentenced inmates. As of the week of April 19, 1982, the population had risen to 392, of whom 115 were state sentenced inmates. *See* Affidavit of Gary Mitchell, filed April 22, 1982.

It can be calculated from the facts adduced by the Special Master with respect to the jail population on February 15, 1982, that pretrial detainees account for approximately 57% of the total population. The duration of confinement of the persons being housed at the UCJ on that particular date was in excess of 75 days for 36.5% of the population, more than 45 days but less than 75 days for 18.1% of the population, and less than 45 days for 45.4% of the population. Of those inmates who had been at the UCJ for more than 75 days as of February 15, 1982, 53.4% were pretrial detainees. A further breakdown of the category of persons who had already been confined for 45 days indicates tht 57% were pretrial detainees.

The UCJ contains 218 general population cells arranged on 19 tiers. Each cell is equipped with a single bed and a combination toilet/sink fixture. All of the general population cells, with the exception of one each on A and B tiers, measure approximately 39 square feet. Of this, approximately 22 square feet are taken up by the furnishings. A corridor fronts the cells on each tier and increases the area accessible to inmates between 6:00 a.m. and 10:00 p.m. by an average of 23 to 28 square feet per inmate, assuming each cell houses only one person. Each cell corridor is equipped with one television set and one telephone. As there are no dining rooms at the UCJ, inmates take their meals on the tiers off trays brought by hot carts. Illumination for the cell area comes from lights in the "officer's corridor" which runs parallel to the cell corridors and is separated from it by iron bars. All parties

conceded to the Special Master that the lighting needs to be improved and the County is prepared to do so.

There are 10 detention/isolation cells ranging in size from 83 square feet to 113 square feet. These cells house inmates guilty of disciplinary infractions or those in need of medical isolation. Each contains a single bed and some are equipped with toilet fixtures.

In addition to the general population and detention cells, there is a "trustees/work release" dormitory currently housing approximately 26 inmates on single and double bunk beds and providing approximately 42.5 square feet per inmate. Two temporary dormitories have also been established in order to accommodate the increased population. Approximately 60% of the men's recreation area has been converted into bedspace for 26 to 28 inmates with an average area of confinement per inmate of 39 square feet. A second temporary dormitory has been constructed in the women's recreation area to provide housing for approximately eight more women with an average area of confinement of 47 square feet. Male dormitory inmates are confined to the dormitory area for substantially the entire day. For security reasons, the female dormitory inmates are confined to the women's tier cell corridor with all of the other women inmates during the daytime hours.

In spite of the creation of temporary dormitories, the County has had to resort to double-celling on the general population tiers in order to house all of the inmates in its custody. Since there is only a single bunk in a general population cell, double celling has been accomplished by placing a mattress on the floor at night. Measuring approximately 16 square feet, the mattress must be placed adjacent to the toilet and occupies virtually all of the otherwise free floor space in the cell. The Special Master found that the double celling practice has had its greatest impact on the pretrial segment of the population.

Double-celling reduces the night space per inmate from 39 square feet to 19.5 square feet, which includes

the bed, the mattress and the toilet/sink fixture. As stated above, the *floor* space is nonexistent. The cell corridor space is also decreased in proportion to the number of cells on the tier that are housing two persons. If half the cells on a tier are being used to house two inmates, the average corridor space per inmate for daytime use is between 15 and 21 square feet, depending on the particular tier. If all the cells on a tier have double occupancy, the corridor space per inmate is only between 11 and 14 square feet. The cell corridor on the women's tier is even more crowded when total double-celling occurs because the women in the temporary dormitory are also confined there during the daytime hours.

When the population at the UCJ has surpassed 365, some inmates have been assigned to mattresses placed on the floor in the laundry area or law library area. These inmates continue to sleep in these areas until the population is reduced, or until they are released or transferred.

The detention/isolation cells have also been affected by the overcrowded conditions at the UCJ. Some of these cells are being used to house as many as four inmates, of whom three must sleep on mattresses laid out on the floor. Inmates in these cells are confined there for all but a few hours a week. Some of the detention cells are equipped with a toilet fixture and group showers are provided daily.

The Special Master further found that the severely overcrowded conditions at the UCJ have had an adverse impact on the support services and inmate programs provided. Recreational opportunity has been especially curtailed due to the increased population and the decreased space available for recreation. Recreation for male inmates is limited to no more than one hour periods, twice per week, which time is also used for access to the law library. The recreational equipment available to the men consists of a ping-pong table and a weight machine. Recreation for the female inmates has been to-

tally eliminated since that room was converted into dormitory space. No outdoor exercise area is provided or feasible because of the UCJ's urban location. The Special Master stated in his findings with respect to this program: "Under existing conditions, I find that there is almost no realistic opportunity for male inmates to enjoy recreation while confined at the UCJ." Special Master's Report ("SMR"), at 13.

Visitation privileges have also been curtailed as a result of the severe overcrowding. Formerly, inmates could receive visitors three times a week for up to one-half hour. Currently, the visitation period must be limited to five or ten minutes and even with that adjustment, not all visitors can be accommodated.

In addition to the impact of the overcrowded conditions on recreation and visitation, the Special Master found that there has been some noncompliance with the State regulation requiring that inmates be provided clean clothes weekly and clean towels daily. Other programs, although they are being administered, have naturally been overburdened by the demands of an increased population. The lack of a screening medical examination during the admission process, while not a phenomenon related to the overcrowding, was found to pose a serious health risk to all inmates.

Instances of fighting amongst inmates have increased due to the overcrowded conditions at the UCJ. Tension has also increased. These present problems could develop into an extremely serious security problem if the UCJ continues at its current population levels into the hot summer months.

OBJECTIONS

There have been no fundamental objections raised by the parties with respect to the Special Master's proposed findings of fact. The County has not filed any objections to the report. The Commissioner's objections with respect to the findings of fact refer only to the Special Master's recommended remedy for alleviating the conditions at the UCJ. Consideration of these objections will be deferred until I have discussed the proposed conclusions of law. The Public Defender has suggested that the proposed findings of fact as to adequacy of certain services are not erroneous if taken in tandem with the improvements already promised by the County, *e.g.*, an increase in the budget for additional medical and dental services. As the County has represented that these services will be improved, I do not find that consideration of this objection is necessary.

I have determined that none of the proposed findings of fact are clearly erroneous, and I shall therefore adopt them without modification.

CONCLUSIONS OF THE SPECIAL MASTER

Based upon the facts as found, the Special Master concluded that the overcrowded conditions at the UCJ do amount to punishment of the pretrial detainees, *Bell v. Wolfish*, *supra*, and cruel and unusual punishment of sentenced inmates, *Rhodes v. Chapman*, *supra*. Specifically, he suggested that the total impact of the following conditions violate the due process rights of the pretrial detainees:

> [T]he unsuitable and unsanitary sleeping conditions resulting from inmates being forced to sleep on mattresses, the almost complete absence of recreational facilities, the cutbacks in visitation, the delays encountered in administering inmate programs, the inadequate lighting in the cellblocks, the inability to provide clean inmate clothing in accor-

> dance with *N.J.A.C.* 10A:31-3.13(b)(5), and the absence of a medical screening procedure for new inmates, amount to "genuine privations and hardships" which cannot be justified by the mere fact that a statewide prison overcrowding problem exists.

SMR, at 19-20.

With respect to sentenced inmates, the Special Master applied the *Rhodes* standard and proposed that "the totality of the conditions currently existing in the UCJ is so severe, in at least two respects, that it exceeds contemporary standards of dignity, humanity and decency and therefore constitutes cruel and unusual punishment." SMR, at 24. Those two respects are the confinement of more than one inmate in each detention cell on floor mattresses for more than several days and the utilization of floor mattresses in the general population cells, library, and laundry areas, for extended periods of time.

The Special Master, pursuant to the Order of Reference dated January 29, 1982, also addressed the issue of the maximum jail capacity that could be constitutionally accommodated. He recommended a maximum capacity of 244 persons which represents single occupancy in each of the 218 general population cells plus the 26 bedspaces in the "trustee/work release" dormitory.[15] He determined that the temporary male and female dormitories must be reconverted to recreational space in order to reinstitute daily recreation. A proposal consisting of certain structural changes put forward by the third-party defendant was rejected primarily because its implementation would exacerbate the already insufficient recreation opportunity. Secondarily, the Special Master found

---

15. The Special Master found that 15 new intake cells would increase the maximum capacity to 259 when they become operational even though they were not designed as general population cells. SMR at 29-30.

that the "benefit" to be gained from these proposed temporary solutions was substantially outweighed by the costs.

Finally, the Special Master recommended as corrective measures that the County eliminate all uses of mattresses, reconvert the temporary dormitories to recreation space, develop a medical screening procedure, and take all steps necessary to provide clean clothing to inmates in accordance with *N.J.A.C.* 10A:31-3.13(b)(5). Furthermore, it was recommended in the report that both the County and the Commissioner be given a reasonable period of time in which to reduce the jail population to the 244 cap. The Commissioner should act by removing the state sentenced inmates; the County should act through the means stipulated to in the Consent Judgment of October 22, 1981.

OBJECTIONS

Objections have been raised by the third-party defendant to the legal standards applied by the Special Master and the legal conclusions drawn therefrom. As stated above, Fed.R.Civ.P. 53(e)(4) requires the district court to review the proposed conclusions of law of the master and determine for itself whether violations exist. I have determined that the Special Master applied the correct legal principles to the conditions at the UCJ and drew the correct conclusion as to the constitutionality of those conditions.

CONSTITUTIONALITY OF CONDITIONS AT THE UCJ

A. *Pretrial Detainees*

[7, 8] The population at the UCJ consists of both pretrial detainees and sentenced inmates, but pretrial detainees are in the majority. The Constitution requires different avenues of inquiry in evaluating the conditions under which these classes of persons may be confined.

Bell v. Wolfish, supra, 441 U.S. at 535, 99 S.Ct. at 1871. The Court stated in *Wolfish* that pretrial detainees are protected by the Fourteenth Amendment against the deprivation of liberty without due process of law and they therefore have a right to be free from punishment prior to an adjudication of guilt. Thus, the test to be applied to the over-crowded conditions at the UCJ is whether they amount to the punishment of this group of inmates. *Wolfish, supra*, 441 U.S. at 535, 99 S.Ct. at 1871; *see Lareau v. Manson*, 651 F.2d 96, 102 (2d Cir. 1981); *Lock v. Jenkins*, 641 F.2d 488, 491 (7th Cir. 1981); *Inmates of the Allegheny County Jail v. Pierce*, 612 F.2d 754, 758 (3d Cir. 1979).

A determination must be made as to whether the condition or restriction is "imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Wolfish, supra*, 441 U.S. at 538, 99 S.Ct. at 1873. The *Wolfish* Court further articulated this standard:

> Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Kennedy v. Mendoza-Martinez*, 372 U.S. [144] at 168-169 [83 S.Ct. 554 at 567, 568, 9 L.Ed.2d 644] . . .

441 U.S. at 538, 99 S.Ct. at 1873.

I concur with the Special Master's conclusions that there has been no express intent to punish the inmates at the UCJ on the part of either the defendants or the third-party defendant. The determination, then, of whether the conditions at the UCJ violate the constitutional rights of the pretrial detainees confined there must depend on analysis of the reasons for and the reasonableness of those conditions. The Court in *Wolfish*

considered the operation of a detention facility in a manageable fashion to be a "valid objective that may . . . dispel any inference that [a] restriction [is] intended as punishment." 441 U.S. at 540-41 & n.23, 99 S.Ct. at 1874–75 & n.23.

The restriction or condition at issue in this litigation is the severe overcrowding of the facility and the impact of the excess population on the provision of services and programs, especially recreation and visitation. The Special Master found that "the conditions caused by severe overcrowding, including cutbacks in inmate privileges and services, are an unavoidable incident of the jail officials' efforts to 'effectively manage' the facility during a statewide prison overcrowding emergency." SMR at 19. I would add that the interests of local and state governments in not releasing onto the streets either pretrial detainees who are not bail worthy or convicted inmates are legitimate ones that *may* justify the severely overcrowded condition at the UCJ. However, the due process rights of the pretrial detainees will have been violated by this condition if it is excessive in relation to the legitimate interest sought to justify it.

Judged by this standard, I have determined that the Special Master correctly found that the due process rights of the pretrial plaintiffs have been violated. This conclusion does not mean that there is a "one man, one cell" principle engrafted onto the Fourteenth Amendment. *Wolfish, supra*, 441 U.S. at 542, 99 S.Ct. at 1875. It is clear that the Supreme Court has not adopted a *per se* rule against double-celling. However, the Court has also not ruled that double-celling is *per se* constitutional.

> While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.

441 U.S. at 542, 99 S.Ct. at 1875.

In *Wolfish*, a federally-operated short-term custodial facility in New York City, the Metropolitan Correctional Center ("MCC"), was the subject of the class action complaint. The MCC was opened in 1975 and it represented " 'the architectural embodiment of the best and most progressive penological planning.' " 441 U.S. at 525, 99 S.Ct. at 1866 (quoting the Court of Appeals). The Court examined the totality of the circumstances in determining that the pretrial detainees at the MCC did not endure genuine hardships. "The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates. It was intended to include the most advanced and innovative features of modern design of detention facilities." 441 U.S. at 525, 99 S.Ct. at 1866.

The inmates at MCC are double-bunked in rooms measuring 75 square feet. The cells, while designed for single occupancy, have been furnished with double bunk beds in order to accommodate the excess population. While 37.5 square feet is an "admittedly rather small sleeping place", several factors brought it within tolerable limits: (a) inmates are confined to the room essentially only during sleeping hours; (b) during the daytime hours they have free access to large common areas and hence do not depend upon the limited amount of space in the cell for exercise; and, (c) nearly all of the detainees are released within 60 days. *Wolfish*, *supra*, 441 U.S. at 541–43 & n.26, 99 S.Ct. at 1875-76 & n.26.

As the Court in *Wolfish* stated, MCC differs markedly from traditional jails. The UCJ is a traditional jail. As outlined above, the cells at the UCJ have a floor space of 39 square feet inclusive of furniture and fixtures. Double-celling has been accomplished by placing a second mattress on the floor of the cell. While inmates are confined to these cells only during the night hours, during the daytime period they do not have open access to a large dayroom or common area. The cell corridors

are narrow and necessarily overcrowded to the same extent that the cells are overcrowded. Recreation in the dayroom is available only in shifts and with the population at approximately 350, the staff has not been able to provide more than two hours of recreation per week.

The Special Master found that under these conditions the practice of double-celling was unconstitutional, particularly because of the use of floor mattresses but also because of the impact of overcrowding on recreational and visitation opportunities. The use of mattresses in the detention cells and in other areas of the UCJ was also considered to be unconstitutional by the Special Master. I shall first review his findings with respect to the use of mattresses. I shall thereafter consider the impact of overcrowding on recreation and visitation.

[9] I agree with the Special Master that the use of floor mattresses constitutes punishment without due process of law in contravention of the rights of pretrial detainees. *See Lareau v. Manson, supra; Vazquez v. Gray*, 523 F.Supp. 1359, 1365 (S.D.N.Y.1981). The practice is unsanitary, dehumanizing, and shocking.

[10] In *Lareau*, 651 F.2d at 105, the Second Circuit held that the use of mattresses placed on the floor of a cell is "too egregious to warrant any . . . leeway." The court considered the practice to be unconstitutional without regard to the number of days the practice continues. I do not agree that the caselaw supports a finding of *per se* unconstitutionality. Under the test articulated in *Wolfish, supra*, 441 U.S. at 542, 99 S.Ct. at 1875, the period of time during which an inmate is subjected to genuine privation and hardship is relevant to a due process inquiry. The clearer the hardship, the shorter the period of time before it raises serious questions under the Due Process Clause.

[11] With respect to the use of floor mattresses in the general population cells, detention cells or other areas of the UCJ, I find that such means are permissible only during an emergency and only if no detainee is so

confined for a period longer than 48 to 72 hours. It would be preferable if collapsible cots were available at least for use in the library or laundry areas. If the defendants are confronted with an "emergency" of longer duration, they are instructed to comply with the other provisions of my order detailed below. (See Appendix B).

[12] In a footnote, the Special Master restricted his consideration of the constitutionality of confining two detainees to a cell to the condition of using mattresses to accomplish "double-celling" and declined to reach the issue of "double-bunking."[16] The Commissioner, in his objections to the report of the Special Master, argued vigorously that double-bunking would remedy the unconstitutional conditions at the UCJ without the need to reduce the population immediately through the transfer of state sentenced prisoners. I specially ordered the parties to address the feasibility and constitutionality of double-bunking at the hearing on March 25, 1982.

The County complied with my request for supplemental briefing by stating that the bunks presently being used in the temporary dormitory cannot be utilized in the general population cells because of the height of the cells. I concur with the third-party defendant that this information is an inadequate response to my directions. The feasibility of other and different forms of bunk beds has not been addressed by the party most familiar with the structural properties of the UCJ. However, for purposes of my analysis under the Fourteenth Amendment, I shall assume that some form of double-bunking is possible.

There can be no doubt that using a double bunk bed is an obviously more sensible manner of providing a per-

---

16. None of the parties has testified, or otherwise suggested, that it would be feasible to equip the 39 square foot general population cells at the UCJ with two beds. I make no ruling on the feasibility or constitutionality of such a practice since that question was not raised in the record before me.
SMR at 28 n 19.

son with a place to sleep. However, the issue is still whether this solution passes muster constitutionally under all the conditions at the UCJ. In this Court's judgment it does not. In a detention facility with larger cells, the arguments of the third-party defendant would be quite plausible. Here, the cell space is, at most, paltry. While the use of a frame bed does mean that an inmate is not required to sleep on the floor next to the urinal, subject to sewage back-up, etc., it does not alter the spatial dimensions of the living quarters. Furthermore, this Court must maintain its focus on the issue of whether the UCJ meets minimum standards of decency.

The stark reality is that, whether provided with bare mattresses or mattresses placed on a frame, when the 39 square feet general population cells are shared by two persons, each person has 19.5 square feet of space inclusive of furniture and fixtures for the period of lock-up at night. Double-bunking in the UCJ is therefore roughly equivalent to quadruple-bunking in the MCC at issue in *Wolfish*. Such spatial starvation cannot pass muster constitutionally. Even the incarcerated are entitled to something more than a walk-in closet.

Furthermore, there is no relief during the day from the adverse effects of overcrowding. As the Special Master found:

> The cell corridors and dormitories where the inmates spend the overwhelming majority of their waking hours are cramped, overcrowded and would allow little opportunity for free movement or exercise even at normal population levels. The pretrial detainees currently housed in general population cells or dormitories at the UCJ can do little more than watch television from 6:00 a. m. in the morning to 10:00 p. m. at night.

SMR, at 22. If I assume that only half of the cells on any one tier are to be double-bunked under the Commis-

sioner's proposed remedy,[17] the average corridor space per person for daytime use will be between 15 and 21 square feet. Added to one person's share of the space of a double-bunked cell, a pretrial detainee at the UCJ is restricted nearly twenty-four hours a day to an area which the Court in *Wolfish* ruled was barely sufficient for sleeping purposes. It falls far short of the 105 square feet governing new prison construction in the state. *N.J.A.C.* 10A:31-2.8(a)(4), (12).

Other courts have found jails with similar or more generous spatial dimensions than those in the UCJ unconstitutional. *See Lareau, supra; Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980); *Heitman v. Gabriel*, 524 F.Supp. 622 (W.D.Mo.1981); *Vazquez, supra; Hutchings v. Corum*, 501 F.Supp. 1276 (W.D.Mo.1980); *Benjamin v. Malcolm*, 495 F.Supp. 1357 (S.D.N.Y. 1980). Thus based solely on considerations of space, I find that double-celling or double-bunking at the UCJ subjects pretrial detainees to genuine hardships amounting to punishment in violation of the Fourteenth Amendment.

My decision does not rest upon an incorporation into the Due Process Clause of the various correction associations' recommendations with respect to the number of square feet appropriate for daytime space in a jail such as that contained in *N.J.A.C.* 10A:31-2.8(a). *See Wolfish, supra.*, 441 U.S. at 543-44 n.27, 99 S.Ct. at 1876-77 n.27. However, the 30 to 40 square feet allotted to a

---

17 This premise is reasonable when based on a population at the UCJ of at least 359 because, assuming I order the elimination of the temporary dormitories and I restrict the detention cells to no more than double occupancy as recommended by the Special Master, 115 out of the 218 general population cells would have to be double-celled. On the day the Special Master toured the UCJ, three tiers were totally double-celled, restricting these inmates to less than 15 square feet of corridor space.

double-bunked detainee is grossly inadequate in comparison to any of these professional standards.[18]

Furthermore, overcrowded cells cannot be examined for constitutionality in isolation from the overall circumstances in the facility. *Wolfish*, *supra*, 441 U.S. at 525, 99 S.Ct. at 1866. In MCC, the hardships, if any, which are imposed upon pretrial detainees by double-bunking are mitigated by the unlimited daytime access to the large common areas. In UCJ, the more serious privations are aggravated by the overcrowded corridors, and the lack of meaningful recreation and other necessities. (For the female inmates, there is a lack of any recreation.) What the Second Circuit stated in *Lareau* with respect to the detention facility in Hartford, Connecticut, is applicable here: "[T]here is no real respite for the double-bunked inmate from the pressures of overcrowding." 651 F.2d at 101.

As found by the Special Master, the County has been unable to provide the inmates with daily recreation off the tier. This is attributable to two factors. The recreation room has been reduced from 1,758 square feet to 720 square feet in order to erect a temporary dormitory for the men during the overcrowding emergency. In addition, the sheer size of the population has overburdened the staff and necessitated a shortening of the recreation time available to each inmate. Yet, recreation, as testified to by Gary Hilton, Assistant Commissioner of Corrections, before the Special Master, is one of the most important programs in a county jail setting for

---

18. For a summary of the recommendations of various commissions, courts and professional organizations, see 3 National Institute of Justice, American Prisons and Jails 2-7 (1980). The recommendations range from 50 to 80 square feet per inmate. Approximately 88% of local jails, according to the National Jail Census, have at least 40 square feet of floor space. 1 National Institute of Justice, American Prisons and Jails 83 (1980).

alleviating physical and mental stress.[19] Even if all of the tiers were single-celled, Mr. Hilton recommended that a commitment should be made by the County to improve the off-tier recreation facilities.

The Commissioner proposes that elimination of the temporary dormitories for the men and women in conjunction with the establishment of a double-bunking practice would remedy any unconstitutional condition at the UCJ. I find this proposal to be unsatisfactory. It is doubtful that recreation will improve so long as the population is as high as it has been for several months even if the size of the recreation room is returned to its normal dimensions. The third-party defendant, in effect, is proposing a trade-off of one "genuine privation" for another. Either the pretrial detainees suffer increased crowding in the cells in order to enjoy slightly improved recreation opportunity or they suffer with the present recreation situation in order to enjoy slightly less crowded cells.[20]

---

19. Transcript of Proceedings, Feb. 18, 1982, at 61-62:

> Mr. Hilton: In a county jail if you were to rate some things that I see as significant the terms of, you know, setting aside food and medical and those things—I think access to a telephone is an extremely significant factor in terms of maintaining mental health.
>
> The fact that, you know, you don't have—are not able to call. That is a tremendous psychological thing. Visits, recreation and an act of the Public Defender Program, where lawyers are in the place, they are seen and they answer telephone calls and don't put inmates off with, "I am in Court," or something like that.
>
> I think they are the four things that make a county jail tolerable.

20. The impact of double-celling has been greatest on the pretrial detainees. Of the 162 inmates subject to double-celling on February 24, 1982, 142 were pretrial detainees. SMR at 8 n.6. This degree of double-celling occurred even though there has been established at the UCJ two temporary dormitories in the former recreation spaces. Recreation and housing in the UCJ are flip sides of the same coin.

Nor is access to a crowded corridor an adequate substitution for real exercise and recreation. The Special Master found the corridors sufficient only for passive activities, such as watching television. At the hearing, the Attorney General on behalf of the third-party defendant suggested, "The best recreation is walking. You can read that in every newspaper article about health and fitness." Transcript at 17. Yet, the Eighth Circuit in *Campbell v. Cauthron*, 623 F.2d 503, 507 (1980), in considering the constitutionality of the Sebastion County Jail, stated: "Merely allowing the inmates to walk around in the narrow corridor between cells does not provide adequate exercise." I agree, and it is evident that Assistant Commissioner Hilton does as well. While I appreciate the salutory effect of walking as an exercise, walking in the cramped corridors of the UCJ cannot satisfy the requirement of providing an inmate with a "healthy habilitative environment." *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977). By any reasonable standard, the provision for recreation and exercise at the UCJ at the present population level is woefully inadequate.

The overcrowded condition of the UCJ is the cause not only of inadequate recreation but also, as found by the Special Master, of reduced visitation privileges. This, too, aggravates the tensions already present because of double-bunking. As testified to by Assistant Commissioner Hilton, visitation has a very significant impact on the mental well-being of an incarcerated person.[21]

---

21. Transcript of Proceedings, February 18, 1982, at 57, 60:

Mr. Hilton: Visiting is, you know very significant—a very significant aspect.

* * * * * *

Mr. Mitchell: There are contact visits in the State system?
Mr. Hilton: Yes, they have them. For most of our inmates, yes.

* * * * * *

Mr. Mitchell: . . . What is your opinion of a visitation policy that provides a five minute visit, an opportunity for a five minute visit through a barrier?

Under the present circumstances, visits have been limited to five to ten minutes, if not indirectly discouraged altogether.[22]

I have determined that double-bunking at the UCJ violates the due process rights of pretrial detainees. It constitutes "confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardships over an extended period of time." *Wolfish, supra*, 441 U.S. at 542, 99 S.Ct. at 1875.

B. *Sentenced Inmates*

[13] In addition to pretrial detainees, there are confined at the UCJ inmates already sentenced to county or state terms of imprisonment. Because these persons have been convicted, the Constitution does not protect them from all punishment but only from cruel and unusual punishment. *Rhodes v. Chapman, supra*. The Special Master found that the practice of sleeping sentenced inmates on mattresses in the general population cells, in the detention/isolation cells, and on the library or laundry floors violated the Eighth Amendment rights of those persons. He also found that sentenced inmates were deprived of adequate recreational opportunity to the same extent as pretrial detainees. *See Miller v. Carson*, 563 F.2d 741, 750 (5th Cir. 1977).

In *Rhodes, supra*, the Court set forth the yardstick to be applied in measuring a prison condition under the Eighth Amendment:

NOTE — *(Continued)*

> Mr. Hilton: Five minutes is a brief period for a visit. If somebody has to come any distance, I think one thing, it is a lot of wasted time. It is as important as visitations—as important is [sic] the inmate's use of a telephone on demand, almost. I think that reduces a lot of anxiety and a lot of the, you know, sense of being away and lost.

22. For some friends and relatives, the prospect of a five-minute visit cannot justify the travel and waiting time. *See, e.g.*, Affidavits of Inmates Terrell and Thomas, SMR Appendix at A91-96.

> Today the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," . . . or are grossly disproportionate to the severity of the crime. . . . No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

452 U.S. at 346, 101 S.Ct. at 2398. (citations omitted).

At issue in *Rhodes* was the Southern Ohio Correctional Facility ("SOCF"), a modern maximum-security state prison. The Court reviewed the findings of the district court and concluded that they did not substantiate its ultimate finding of unconstitutionality. The cells at SOCF are 63 square feet and contain a bunk bed, night stand, sink with hot and cold running water, a sanitary toilet, and a wall-mounted shelf, cabinet and radio. They are heated and ventilated, and some even have a window that inmates can open and close. 452 U.S. at 341, 101 S.Ct. at 2396. In sum, as the Court stated, "though small, the cells at SOCF are exceptionally modern and functional." *Id.* at 349 n. 13, 101 S.Ct. at 2400 n. 13.

As a result of double-celling at SOCF, job and educational opportunities had diminished "marginally". *Rhodes*, *supra*, 452 U.S. at 348, 101 S.Ct. at 2399. However, it "had not reduced significantly the availability of space in the day rooms or visitation facilities." *Id.* at 342, 101 S.Ct. at 2396. In light of these findings, Justice Powell, writing for the Court concluded:

> The double celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement.

Id. at 348, 101 S.Ct. at 2399.

[14] Conditions at SOCF obviously do not mirror conditions in older prisons which the Court stated "have justly been described as 'deplorable' and 'sordid.' *Bell v. Wolfish*, 441 U.S. at 562, 99 S.Ct. at 1886." *Rhodes, supra*, 452 U.S. at 352, 101 S.Ct. at 2401. When such conditions "alone or in combination . . . deprive inmates of the minimal civilized measure of life's necessities," *id.* at 347, 101 S.Ct. at 2399, and can be said to be cruel and unusual under contemporary standards of decency, federal courts must "discharge their duty to protect constitutional rights.'" *Id.* at 352, 101 S.Ct. at 2401.

[15] The conditions of overcrowding and double-celling are not to be viewed in isolation. Rather, provision of space must be viewed against the totality of conditions. *Rhodes, supra*, 452 U.S. at 363 & n.10, 101 S.Ct. at 2407 & n.10 (Brennan, J., concurring). *See also, Stewart v. Winter*, 669 F.2d 328, 335–36 (5th Cir. 1982); *Ruiz v. Estelle*, 666 F.2d 854, 858 (5th Cir. 1982); *Madyun v. Thompson*, 657 F.2d 868, 874 (7th Cir. 1981); *Hendrix v. Faulkner*, 525 F. Supp. 435, 524 (N.D.Ind.1981).

[16, 17] I agree with the Special Master that requiring sentenced inmates to sleep for long periods of time in mattresses positioned on the floor constitutes cruel and unusual punishment. It is a "reprehensible and dehumanizing" practice. SMR, at 25. The practice deprives these inmates of the essential requirement of habitable shelter. As stated by the Tenth Circuit, shelter is a core area of concern under the Eighth Amendment and it goes beyond having a solid roof over one's head:

> In *Battle v. Anderson, supra*, we upheld the district court's conclusion that "[i]t is incumbent on the incarcerating body to provide the individual with a healthy habilitative environment." 564 F.2d at 395. In affirming in *Battle*, we upheld the finding that 60 square feet of living space was the minimum

> amount of square footage which the Eighth and Fourteenth Amendments require that a state provide an inmate. *Id.* at 395, 397, 403. . . . In short, a state must provide an inmate with shelter which does not cause his degeneration or threaten his mental and physical well-being. *Battle v. Anderson*, *supra*, 564 F.2d at 403.

Ramos v. Lamm, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981).

[18] Even considering the incremental improvement in living conditions at the UCJ that would occur upon substituting bunk beds for mattresses, the stark reality is that 30 square feet of daytime space or 19.5 square feet of sleeping space fails to meet any contemporary standard of decency especially in light of the impact overcrowding has had on visitation, recreation, and time off the tier, as detailed above. *See, e.g., Lareau*, *supra*; *Ramos*, *supra*; *Ruiz*, *supra*; *Smith v. Fairman*, 528 F.Supp. 186 (C.D.Ill.1981). With regard to the detention/isolation cells, I agree with the Special Master that the cells can constitutionally accommodate two persons if each is provided with a bed. But the practice of housing three or four inmates on mattresses is deplorable and cannot be countenanced.

[19] Although the standard against which the court must judge conditions imposed upon sentenced offenders is more stringent than that which guides the analysis of conditions of confinement of pretrial detainees, I find that the conditions at the UCJ are too egregious to satisfy either standard. Double-bunking, as practiced at the UCJ or as proposed, except in the detention/isolation cells, violates the Eighth Amendment as well as the Fourteenth Amendment.

In sum, I will accept the proposed conclusions of law of the Special Master, as modified by my consideration of the constitutionality of a double-bunking prac-

tice at the UCJ. I must now turn my attention to fashioning an appropriate remedy for these constitutional violations.

REMEDY

[20] I am very mindful of the delicate balance established by the Constitution between federal and state governments. *See Rizzo v. Goode*, 423 U.S. 362, 378, 96 S.Ct. 598, 607, 46 L.Ed.2d 561 (1976); *see also O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm & Mary L.Rev. 801 (1981). Especially in the area of prison administration, judicial restraint is necessary in order to ensure that the business of operating a state corrections system stays in the hands of persons most able to accomplish this difficult task. *Bell v. Wolfish, supra*, 441 U.S. at 562, 99 S.Ct. at 1886.

[21] These admonitions give a federal court pause to consider the implications of interfering in a local jail problem. Nevertheless it is a solemn duty of a district court to "scrupulously" observe whether there has been a constitutional failing in a challenged jail facility. *Wolfish, supra; Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). In *Procunier, supra*, 416 U.S. at 405–06, 94 S.Ct. at 1807–08, the Court said:

> But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

As I have determined that the UCJ as it is presently operated offends the fundamental guarantees of the Eighth and Fourteenth Amendments, I must complete the task required of me by the Constitution.

[22] It has been noted previously that all the parties agree that the UCJ is seriously overcrowded and that the single most pervasive cause for this condition is the continued presence of state sentenced inmates. The confinement of state inmates in the UCJ is caused, in turn, by the valid and reasonable exercise of powers vested in the Commissioner under the Governor's Executive Orders. *Worthington v. Fauver, supra*, 88 N.J. at 198, 440 A.2d 1128. Consequently, the overburdened Union County facility, as detailed above, has succumbed to other egregious conditions, such as the lack of meaningful recreation and visitation, and the lack of adequate living space, which undermine its habitability.

I have concluded on this basis that the environment at the UCJ is so degenerative and unhealthy as to be constitutionally impermissible. As the Executive Orders have contributed substantially to this unconstitutional situation, under the Supremacy Clause of the Constitution the Executive Orders as applied to the UCJ must yield. U.S.Const.Art. VI, cl. 2. *See also Jacobson v. Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358, 360, 49 L.Ed. 643 (1905). The administrative action designating the UCJ as the place of confinement of state sentenced inmates is void and *N.J.S.A.* 2C:43–10(c) shall be given full force and effect.

This Court, however, is not unmindful of the good faith efforts of this administration and the previous administration to find a solution to the problem of overcrowding. *See, e.g., Report of the Governor's Task Force on Prison Overcrowding*, December 3, 1981. Governor Kean has taken special note of this crisis. He indicated in his budget message, delivered on March 15, 1982, the State's role and its responsibility in the matter of insufficient county jail bedspaces:

> Our state problems have been passed down to the counties and in some cases even to our municipal jails. Go, as I have, to jails in counties like Essex,

> Passaic and Camden and you will see the results of our neglect. This budget provides us with the money to start to rectify this problem and place state prisoners into state custody where they rightfully belong.

It is obvious that the Chief Executive of the State is aware of the problem.

One of the measures which the Governor is taking in response to this emergency, in addition to seeking appropriations for new prison construction, is the execution of a lease with the United States Army for the use of the stockade at Fort Dix. At my request, Commissioner Fauver submitted an affidavit outlining the timetable for the transfer of inmates to Fort Dix, to be designated as the Mid-State Correctional Facility:

> I anticipate that I would be able to arrange for the placement of state inmates in the Mid-State Correctional Facility, commencing May 15 to May 31, at the rate of 80 per week, until the facility is filled with 500 inmates on or about approximately July 10.

Affidavit of William H. Fauver, filed April 5, 1982, ¶ 11. Hopefully this facility will go some of the distance toward rectifying the State's "neglect".

I am persuaded by the good faith representations of the third-party defendant that at least a temporary solution to the UCJ situation can feasibly be arranged by approximately June 15, 1982. Insofar as the State is acting with reasonable alacrity in this matter, I will stay the operation of *N.J.S.A.* 2C:43–10(e) as applied to the UCJ until July 1, 1982, rather than impose an overnight remedial order upon the parties. The stay will provide the State with sufficient leeway to enable it to administer the transfer of state sentenced inmates from the UCJ. Whether the measures proposed by the administration will suffice beyond the immediate moment and solve the

long-run crisis of a burgeoning prison population should give the public pause, but it is not an issue properly before this Court. Nor does this Court have jurisdiction to order alternative relief in the form of, *e.g.*, parole guideline revisions. That clearly is the duty of the state legislature. My duty is to order speedy but fair relief for the plaintiffs to remedy the constitutionally impermissible conditions under which they are confined before the hot summer months ignite this tinderbox.

[23] I have also determined that the County, which is primarily responsible for providing a constitutional jail, is not to be relieved of the consent judgment it voluntarily entered into except in one respect. Fed.R.Civ.P. 60(b)(6). That rule provides in pertinent part:

> On motion and upon such terms as are just, the Court may relieve a party or his legal representatives from a final judgment, order or proceeding for . . . (6) any reasons justifying relief from the operation of the judgment.

On the motion to set aside the consent order, the County has the burden of proving that the order is too burdensome under circumstances that have significantly changed since the settlement was entered into. *See United States v. Swift & Co.*, 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932). Although *Swift* was decided prior to the enactment of the federal rules, it continues as the standard for equitable relief from a judgment. In *Swift*, the Court stated:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of

> readjusting. Life is never static. . . . The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

286 U.S. at 119, 52 S.Ct. at 464.

The order being entered as a result of this decision relieves the County of a substantial burden. It in effect grants to the County the injunction on the third-party complaint sought by it prior to my appointment of the Special Master. Furthermore, circumstances have not changed significantly since the County entered into the stipulation of settlement. As stated by Judge Lasker in the Southern District of New York in a similar State prison-County jail context: "Moreover, the only circumstance which has changed—an increase in the population of the State's prison population—was entirely foreseeable in [October], 1981, and had been for a long period before that date." *Benjamin v. Malcolm*, 528 F.Supp. 925, 929 (1981).

[24] Because I believe that the provision in the consent order requiring the County to close the doors to the UCJ as a "last-resort" measure is an unnecessarily intrusive and disruptive one, I will relieve the County of complying with it. In its stead, the County is directed to exhaust in good faith all other avenues of relief set forth in that order and then to seek relief in this Court.

As the County has not filed any objections to the report of the Special Master and as I have concurred in all material respects with the findings and conclusions of that report, the County shall be ordered to implement a

medical screening program, to reinstate the recreation and visitation programs to prior levels, and to comply with *N.J.A.C.* 10A:31–3.13(b)(5) regarding clean clothes and towels. I note the representations made by the County to the Special Master that lighting on the tiers will be improved and that additional medical and dental personnel will be hired.

[25] One final remedial measure must be established: a maximum population capacity. While the Second Circuit has preferred a more flexible mechanism, *see Lareau, supra*, the circumstances of the UCJ make it more appropriate to use a "cap". In this case, all the parties have either consented to or admitted that the capacity of the UCJ is 238. *See* Letter from William H. Fauver to Judge DiBuono, dated February 20, 1981, SMR Appendix at 224. I find that the facts support a capacity figure of 259: 218 single general population cells, 26 in the "trustee/work release" dormitory, and 15 new intake cells. The detention/isolation cells with a double bunk in each are not included in the capacity because they are reserved for special administrative purposes. In light of my order directing the Commissioner to remove the state sentenced inmates by July 1, 1982, I find that the County should have until July 1, 1982, to implement the "cap" as a reasonable accommodation of all interests.

I will retain jurisdiction in order to monitor compliance with the order being entered on this decision. The Special Master is to report to the Court every sixty days until discharged. Defendant Colletti is to report on the County's actions pursuant to this order every sixty days until ordered otherwise. The report is to be served upon the parties, the Special Master, the Court, the County Prosecutor, the Board of Chosen Freeholders, and the assignment and criminal assignment judges of the County.

An order in conformance with this opinion has been filed by the Court.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 81-863

UNION COUNTY JAIL INMATES
TIMMIE LEE BARLOW, et al.,

Plaintiffs

v.

JAMES SCANLON, THOMAS JEFFERSON, etc., et al.,

Defendants : *ORDER*

v.

WILLIAM H. FAUVER, Commissioner, Department of Corrections

Third-Party Defendant

Pursuant to Rule 53(b) of the Federal Rules of Civil Procedure,

It is on this 29th day of January, 1982 ORDERED that this case is hereby referred to the HON. WORRALL F. MOUNTAIN as Special Master; and

It is further ORDERED that the Special Master shall conduct a thorough examination into the totality of the conditions at the Union County Jail in accordance with the guidelines set forth below and in this Court's Opinion of January 29th, 1982 and shall submit to the Court his proposed findings of fact and conclusions of law as to whether the overcrowded condition of the jail is violative of the Eighth Amendment to the United States Constitution with respect to sentenced inmates or of the

Fourteenth Amendment with respect to pretrial detainees; and

It is further ORDERED that the Special Master shall have the additional duty to evaluate compliance with and make recommendations on the implementation of the Stipulation of Settlement and Consent Order entered by this Court on October 22, 1981; and

It is further ORDERED that, in order to enable the Special Master to carry out his duties, he shall have the following powers and authority:

1) The Special Master is authorized to select and hire, with prior approval of the Court, such assistant(s) as may be required to aid him in performing his duties. With prior approval of this Court, the Special Master may also consult appropriate, independent specialists.

2) The Special Master shall have unlimited access to the premises of the Union County Jail at any time and he shall notify counsel for the parties so that they or their designees may accompany him if they desire.

3) The Special Master shall have unlimited access at reasonable times to all files, statistics, plans, and reports relating to the Union County Jail.

4) The Special Master shall be authorized to conduct confidential interviews at any reasonable time with any staff member or inmate, and shall have the right to attend any institutional meeting or proceeding.

5) The Special Master shall be empowered to hold hearings and to call witnesses, including both inmates and staff of the Union County Jail.

6) The Special Master shall have the authority to seek orders from the Court to show cause why the defendants or third-party defendant, or any of their agents, employees, or persons acting in concert with them, should not be held in contempt for fail-

ure to comply with his instructions or orders, or the Orders of this Court.

It is further ORDERED that the defendants shall post notices throughout the Union County Jail stating that the Court has appointed a Special Master, who may from time to time visit the jail, and talk to the staff members or inmates. The notice shall emphasize that the Special Master's function is only to aid the Court in its determination of the constitutionality of the overcrowded condition of the jail and of the defendants' compliance with the Court's Order of October 22, 1981; that his appointment is not to be considered as providing any substitute for, or addition to the regular grievance and disciplinary procedures of the jail; that he is not to investigate, to abitrate, or to interfere with the disposition of the grievances or complaints of individual inmates or staff members; that if the Special Master desires any information from either inmates or staff with respect to such matters, he will initiate the matter; and that if any person, inmate or staff member desires to bring any matter to the attention of the Special Master, he or she may do so only by making the desire known to counsel for the parties, who will then decide whether to bring the matter to the attention of the Special Master. The notices to be posted throughout the Union County Jail shall state the name and address of counsel for the plaintiff class, counsel for the defendants, and counsel for the third-party defendant. The notices shall remain posted until the Special Master has been discharged. The form of the notices shall be drafted by counsel and fixed by the Special Master; and it is further

ORDERED that not later than forty-five (45) days after his appointment, the Special Master shall file his proposed findings of fact and conclusions of law as to whether the Union County Jail is unconstitutionally overcrowded. The report shall separately address the following specific issues:

1) what is the maximum capacity of the jail, taking into consideration day and night uses, and weekend sentences?

2) whether the support services and facilities can sufficiently accommodate that capacity; and

With respect to each issue, the Special Master shall, if appropriate, set forth a proposed timetable for the institution of any changes which he recommends, and a proposed classification scheme for any releases which may be necessary; and

It is further ORDERED that not later than forty-five (45) days after his appointment, the Special Master shall file his first report evaluating the defendants' compliance with this Court's Order of October 22, 1981. As to each item of the Stipulation of Settlement and Consent Order, the report should show:

1) the state of compliance;

2) the reasons for the defendants' failure or inability to comply with any item;

3) whether or not he believes that the defendants have made a good faith effort to comply;

4) the evidentiary basis for the Special Master's conclusions, whether observation, interview, statistical survey, hearing or other means;

5) recommendations as to how compliance could be effected, whether by specifically recommending the release of a number of persons or by modifying the responsibilities of the county under the Consent Order; and

It is further ORDERED that the parties shall have ten (10) days after the Special Master submits his report to serve written objections with the Court and other parties if they so desire; and

It is further ORDERED that within fifteen (15) days after the filing of the report, the Clerk of the Court shall set the case for a continuation of the order to show

cause hearing. The Court shall accept the Master's findings of fact unless clearly erroneous. The Court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions; and

It is further ORDERED that after the filing of the initial report on defendants' compliance with the Court's Order, the Special Master shall file reports not less often than every sixty (60) days, until he finds that the defendants and third-party defendant have fully complied with the Court's Order of October 22, 1981, or any Supplemental Orders of the Court, and that such compliance has continued for a sufficient length of time to make a lapse into noncompliance improbable. At that time, the Special Master may recommend his discharge; and

It is further ORDERED that pursuant to rule 53, Federal Rules of Civil Procedure, the Special Master shall be allowed his necessary expenses and a fee of $85.00 per hour for his services in carrying out his duties, which shall be taxed as part of the costs of this matter and assessed against the defendants. The Special Master shall keep a record of the time spent in connection with his duties, which he shall submit to the defendants every thirty (30) days for processing and payment; and

It is further ORDERED that the Court shall retain jurisdiction over the parties and this cause of action.

Filed April 27, 1982.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 81-863

UNION COUNTY JAIL INMATES
TIMMIE LEE BARLOW, et al.,

Plaintiffs

v.

JAMES SCANLON, THOMAS JEFFERSON, etc., et al.,

Defendants — *ORDER*

v.

WILLIAM H. FAUVER, Commissioner, Department of Corrections,

Third-Party Defendant

This matter having come before the Court on the motion of the third-party defendant, William H. Fauver, Commissioner, Department of Corrections, for a hearing on objections to the Special Master's Report filed February 26, 1982, pursuant to Fed.R.Civ.P. 53, and said hearing having been held on March 25, 1982; and

The Court having considered the Report of the Special Master, the objections of the parties, supplemental briefs and affidavits, and for the reasons expressed in its opinion of April 27, 1982,

It is on this 27th day of April, 1982, ORDERED that the findings of fact of the Special Master be adopted and that the Union County Jail be declared unconstitutionally overcrowded; and

It is further ORDERED that:

(1) On or before July 1, 1982, the third-party defendant is to remove any and all inmates incarcerated at the Union County Jail who as of fifteen (15) days prior to that date have been sentenced to terms of imprisonment in state facilities; and

(2) The third-party defendant from that date forward shall fully comply with N.J.S.A. 2C:43-10(e) with respect to persons who are or shall be incarcerated at the Union County Jail; and

It is further ORDERED that the Consent Judgment approved by this Court on October 22, 1981, continue in full force and effect, except as modified or supplemented as follows:

(a) The defendants shall, pursuant to N.J.A.C. 10A:31-3.16(b)(10), provide at least one hour of recreation daily to each inmate;

(b) The defendants shall reinstitute a program of at least three one-quarter hour visitation periods per week;

(c) The defendants shall implement a medical screening program for new admittees;

(d) The defendants shall provide clean clothing weekly and clean towels daily to all inmates in accordance with N.J.A.C. 10A:31-3.13(b)(5).

(e) The defendants shall not place more than two (2) inmates in any of the detention/isolation cells.

(f) The maximum capacity of the Union County Jail is, until it is enlarged,replaced or modified, two hundred fifty-nine (259), specifically to include one (1) person in each general population cell, twenty-six (26) persons in the "trustee/work release" dormitory, and one (1) person in each intake cell;

(g) The defendants shall have until July 1, 1982, to reduce the population at the Union County Jail to the maximum capacity;

(h) In addition to the other mechanisms required to be used under the Consent Judgment whenever the population has exceeded the maximum capacity for more than seventy-two (72) hours, the defendants shall after July 1, 1982, notify the Department of Corrections to remove any state prisoners who have remained at the facility beyond the statutory fifteen (15) day period since sentence was imposed, and shall notify the Board of Chosen Freeholders of the necessity to make other arrangements for the housing of the excess number of county inmates and pretrial detainees;

(i) The defendants shall further notify the parties to this action and this Court if either the Department of Corrections or the Board of Chosen freeholders fails to act upon these notifications within two weeks, whereupon the Court shall take such actions as are consistent with and which will effectuate the Court's findings of fact and conclusions of law in its opinion filed this date; and

(j) The defendants shall not refuse to admit any persons lawfully brought to them, and any agreement to do such in the Consent Judgment entered on October 22, 1981, shall be null and void.

It is further ORDERED that no person who is or shall be incarcerated at the Union County Jail be required to sleep on a mattress placed on the floor of any cell or in any other area of the facility for longer than seventy-two (72) hours, after which time he or she shall be assigned to a single cell for at least two weeks, unless released or transferred sooner.

It is further ORDERED that defendant Coletti complete a report every sixty (60) days setting forth the weekly population figures for the preceding sixty day pe-

riod, and the extent and means of compliance with this Court's order, and shall serve such report upon the Court, the Special Master, plaintiffs' counsel, County counsel, the Commissioner of Corrections, the Board of Chosen Freeholders, the County Prosecutor, the Assignment Judge of Union County, and the Criminal Assignment Judge of Union County.

It is further ORDERED that the Special Master shall monitor compliance by the defendants and the third-party defendant with the orders of this Court.

Jurisdiction is retained.

A-121

Filed December 8, 1983.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5310

October 21, 1982

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, et al.,

v.

V. WILLIAM DI BUONO, etc., et al.,

v.

WILLIAM H. FAUVER, etc., et al.,
William H. Fauver, etc.,
Appellant

(NJ D.C. Civil No. 81-863)

Present: HUNTER and GARTH, *Circuit Judges*, and WEBER, *District Judges*.

1. Motion by appellees, Union County Jail Inmates, Barlow, Evans, Skinner, Wysocki, etc., to permit the filing of an appendix, in the above-entitled case listed for disposition on the merits on December 14, 1982.

Respectfully,

Clerk

enc.
ad
P.S. Appellees' appendix was received in the Clerk's office on October 13, 1982.

APPENDIX H

The foregoing Motion is/are granted.

By the Court

Judge

Dated: December 8, 1983
ad/cc: Joseph T. Maloney, Esq.
Robert C. Doherty, Esq.
T. Gary Mitchell, Esq.
Howard Moskowitz, Esq.

Filed October 17, 1983.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNION COUNTY JAIL INMATES, et al., *Appellees*,	:	No. 82-5310
v.	:	
V. WILLIAM DIBUONO, et al.,	:	AFFIDAVIT
v.	:	IN SUPPORT
WILLIAM H. FAUVER, etc., *Appellant*.	:	OF MOTION TO STAY OR RECALL OF MANDATE

STATE OF NEW JERSEY)
: SS.:
COUNTY OF UNION)

ROBERT VASQUEZ, of full age, duly sworn according to law, upon his oath deposes and says:

1. I am the Director, Division of Correctional Services, Department of Public Safety of the County of Union and as such am the Chief Operations Officer of the Union County Jail. I formally was employed by the New Jersey Department of Corrections and have served in Rahway State Prison.

2. I have served at the Union County Jail since June, 1982 and am personally familiar with the Jail and its operations since that time, including compiling the necessary information supplied to U.S. District Judge Ackerman pursuant to his Order for 60 day status reports on conditions of the Jail.

3. The State Department of Corrections has continued to remove all State sentenced inmates within 15 days pursuant to Judge Ackerman's Order, which action was originally contemplated as the "safety valve" to assure that our population cap of 259 would not be exceeded.

4. Since July, 1982, however, as detailed in the status reports filed with Judge Ackerman, our average weekly population has steadily increased to 290 inmates and daily population counts in the 300s are the rule rather than the exception, and *this is so without the ex-*

cess number that will be housed if the State no longer is required to remove the State sentenced inmates, which has averaged 40 inmates per month.

5. If the proposal to install additional bunks in the existing 218 general population cells is carried through, coupled with the end to the requirement for removal by the State of their inmates, the permissable population level at the Jail will increase to 436 inmates not counting the dorms, administrative segregation and medical cells.

6. The County has expended all necessary funds for additional staff, food, clothing, laundry supplies and will continue to do so, even though it has caused severe strain on fiscal resources.

7. My concern with the continuing rise in population at the Jail, and the dramatic effect the installation of double bunks in the general population cells and termination of the mandatory removal of State sentenced inmates will have on that population, is directed to the security of the institution and safety of my staff and other persons normally in the Jail and logistical problems such a population level will cause.

8. In order to maintain cleanliness and normal maintenance of the facility itself we must regularly paint and at times fumigate the Jail. To do this, we must remove inmates from the tier for a minimum of 10 hours (pest fumigation-bomb dispelling time) or two days (paint drying time). Once we exceed 325 inmates we simply have no physical location to place the inmates for the required time, and maintenance must fall behind.

9. Once our population exceeds 330 we must house "weekenders" in minimum security on the ground floor. The possibility increases for the introduction of contraband into the facility since these inmates come in from the outside. Recently one such inmate "overdosed" on drugs on his way into the Jail, presumably to avoid having his pills confiscated, and had to be rushed to the Hospital.

10. If the population continues to increase, the County will be forced to contract for services to be performed outside the Jail for such things as doing laundry, since our own laundry room will be unable to handle the overload. This increases the possibility of smuggling contraband into the Jail from the outside, and would be similar to the introduction into the Jail of a gun in September 1981 during an overcrowded visitation period which resulted in a riot and correction officers held hostage for a period of time.

11. There have also been a series of attempted suicides in the Jail during 1982-1983 and a marked increase in psychiatric referrals has occurred in 1983, as evidenced by Exhibit C attached (Elizabeth General Hospital serves as the Jail's Mental Health Program under Contract with the County).

12. There have been increased problems of theft and fighting between inmates who are double bunked now which creates disciplinary problems and we are only partially double bunked.

13. As the population increases the mood at the Jail becomes tense and the only feasible method of preserving security and maintaining public safety at the Jail is to continue "lock ups" and the curtailment of all but minimal privileges, which will further exacerbate tensions.

14. The increase of population also creates tension on the part of the correction officers who are often times forced to work extra shifts in order to maintain adequate security. Their safety is jeopardized because of the constant and necessary logistical movement of an ever increasing number of inmates for various activities (Court, recreation, visitation, attorney consultations), all of which is done outside of cells and increases the potential for hostage taking.

15. On a normal day a total of 131 inmates at any one time are in movement outside their cells based on the following breakdown:

Purpose/Group	Number	Hours
To Court	25	8:30 a.m.-10:00 a.m.
Laundry Trustys	8	8:30 a.m.- 3:30 p.m.
Kitchen Trustys	12	6:00 a.m.- 1:30 p.m.
Yard Trustys	3	8:00 a.m.- 4:00 p.m.
Feeding Trustys (Male)	15	7:15 a.m.- 9:00 a.m.
(Female)	3	7:15 a.m.- 9:00 a.m.
Dormitory Trusty	1	8:00 a.m.- 5:00 p.m.
Inmates at Recreation	32	During Day-Various
Inmates at Consultations	7	9:00 a.m.-11:15 a.m. 1:00 p.m. 3:15 p.m.
Medical Call	25	9:15 a.m.-11:15 a.m.

Also in the Jail on a regular basis during part of this time are attorneys, probation workers, social workers, and medical personnel and with approximately 45% of the average inmate population (based on 300) out of their cells at the same time the possibility of a hostage situation dramatically increases, especially as the overall population increases, as would happen if Judge Ackerman's Order is modified as presently proposed.

16. At our present population level we are forced to curtail usage of the law library because of the sheer logistical inability to serve all who desire it. When our population was below 275 we experienced no difficulty in this area.

17. Recreation is provided to one tier or floor at a time. Presently that entails, on the average, 32 inmates per hour (average tier population). If all our general population cells were double bunked we would have to recreate 64 inmates per hour in an area 40' x 20' and consisting of a universal gym machine, heavy punching bags, ping pong tables and board games. The sheer number of inmates contained in that area (12.5 square feet per inmate at 64 inmates) under those conditions poses a threat to the safety of the officers assigned to recreation and can only serve to increase tensions and frustrations.

18. While the installation of a double bunk in each cell might serve the salutary purpose of removing an inmate from the floor of the cell to a bunk, it would do nothing to alleviate the more pressing problem at the Jail — excessive population which seriously jeopardizes the safety and security of the corrections officers and other regular working visitors to the Jail (attorneys, social workers, etc.).

19. If the portion of Judge Ackerman's Order requiring removal of State sentenced inmates is vacated the population at the Jail, based on what is happening in every other County Jail in this State under the Executive Order, will just increase even further and produce a clear and continuing danger to the security of the Jail and safety of my officers.

20. The mood at the Jail is tense and unless the only available and practical existing "safety valve" of mandatory removal of State sentenced inmates is continued I truly fear additional incidents at the Jail which could prove more violent and damaging than the riot and hostage taking of September 1981.

21. I respectfully urge the Court to stay the issuance of the mandate or, in the alternative, recall the same in order to allow the reconsideration of that part of this Court's decision modifying Judge Ackerman's prior Order on removal of State sentenced inmates.

ROBERT VASQUEZ

Sworn to and Subscribed before
me this 17th day of October,
1983.

DONNA J. SCHLEUNING
Notary Public of New Jersey
My Commission Expires June 29, 1988

Filed October 22, 1981.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, et al.,	:	
Plaintiffs,	:	
v.	:	Civil No. 81-863 (H.A.A.)
V. WILLIAM DiBUONO, Assignment Judge, et al.,	:	
Defendants,	:	AFFIDAVIT
v.	:	
WILLIAM H. FAUVER, Commissioner, Department of Corrections, *Third Party Defendants*	:	

STATE OF NEW JERSEY:
ss:
COUNTY OF UNION :

LOUIS J. COLETTI, of full age, being duly sworn according to law, upon his oath deposes and says:

1.) I am the Acting Director, Division of Correctional Services, Department of Public Safety, the overall administrative head of the Union County Jail. I am also the Criminal Justice Planner of the County.

2.) I have been familiar with the overcrowding at the Jail in my capacity as Criminal Justice Planner and as Chairman of a Task Force on Jail overcrowding appointed by the County Manager in August 1980 and author of the final report in March, 1981.

3.) Since September 15, 1981 I have been directly in charge of the Jail as part of my administrative duties.

4.) On the night of September 12, 1981 a riot took place at the County Jail in which over $25,000 of damage was caused and, of more concern than money, six Corrections Officers were held hostage at gunpoint.

5.) A Grand Jury has been impaneled to look into Jail operations and other matters but with respect to this matter certain indictments have been handed up, specifically alleging that the gun was smuggled into the jail during a crowded condition during a visitation period.

6.) The crowded visitation period is a direct result of the overcrowded condition of the jail itself, and such created a serious breach of security at the jail.

7.) As a direct result of the overcrowding, which has led to this security breach and thus the riot, many of the security devices were damaged or destroyed, requiring the County to preserve public safety by locking up all inmates and by curtailing or eliminating other privileges.

8.) During this year of 1981 there have also been a series of attempted suicides and two actual deaths have occurred, and this is at least partially as a result of the overcrowded condition of the Jail and the frustration caused thereby.

9.) During this year of 1981 one inmate literally "walked out" of the County Jail during another crowded visitation period.

10.) The only feasible method of preserving security at the Jail and maintaining public safety is to continue "lock ups" and curtailment of all but minimal privileges for the inmates, but these methods are not desirable from my standpoint nor in the long term best interests of anyone, inmates or public.

11.) The mood at the County Jail is tense and unless we can receive immediate relief in the form of a substantial reduction in inmate population, such as we seek in our Third Party Complaint, I truly fear additional incidents at the jail which could prove more violent or damaging than those already suffered.

12.) During 1981, as a direct result of overcrowding, the County was forced to appropriate by Emergency Appropriation a sum in excess of $325,000 for the purpose of meeting overtime expenses of the staff and for extra food and other provisions for the increased inmate population.

13.) I have reviewed Mr. Maccarelli's analysis and statistics upon which it is based and it conclusively shows the availability of bed spaces for all state prisoners at the Union County Jail. Were all state prisoners to be removed a substantial reduction of our inmate population would be achieved and there *still* would be a relatively large number of spaces left for other areas of the State.

14.) I respectfully urge and implore this Court to compel the Commissioner of Corrections to remove all state prisoners from the County Jail to defuse the existing tension and allow the new Administration to go forward with correcting past deficiencies.

LOUIS J. COLETTI

Sworn and Subscribed before
me this 15th day of October,
1981.

Stella Tomick
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAR. 27, 1983

Filed October 22, 1981.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, et al.,	
Plaintiffs,	
v.	Civil No. 81-863 (H.A.A.)
V. WILLIAM DIBUONO, Assignment Judge, et al.,	
Defendants,	AFFIDAVIT
v.	
WILLIAM H. FAUVER, Commissioner, Department of Corrections,	
Third Party Defendants.	

STATE OF NEW JERSEY:
ss:
COUNTY OF UNION :

WARREN R. MACCARELLI, of full age, being duly sworn according to law, upon his oath deposes and says:

1.) I am the Coordinator of Correctional Services, Office of the Jail Administrator of the County of Union and have been actively engaged in monitoring the jail population problems since the beginning of this year.

2.) Our total jail population has averaged approximately 300 during 1981 with approximately 50 inmates the average number of state prisoners sentenced more than 15 days and destined to be transported to State institutions.

APPENDIX K

3.) The Union County Jail has a rated capacity of 238 inmates and the average monthly jail population for the entire year of 1981 has always exceeded this rated capacity.

4.) Since the issuance of the Governor's Executive Order on June 19, 1981 the average total population of the Union County Jail has been 301.82, through October 6, 1981. The average number of state prison sentenced inmates has been 49.06.

5.) On September 12, 1981, the night of the riot in the Jail, the population was 314 of which 77 were state prisoners sentenced over 15 days previously.

6.) Although we have been constantly advised by the Department of Corrections that there are no beds available at state or other facilities made available by the Executive Order, within days after the riot a total of 25 state prisoners were removed.

7.) As a direct result of the riot many of the security devices of the jail, such as security glass and screening, window bars and metal doors have been damaged or destroyed. Consequently the inmates have been locked in their cells until minimal security could be installed.

8.) Recreational equipment had also been destroyed in the riot and must be replaced, thereby substantially reducing the already severely limited recreational activities of the inmates.

9.) The items listed in Paragraphs 7 and 8 are set forth as examples of further exacerbation of an already explosive situation resulting from overcrowding.

10.) As part of my duties I have conducted a study of information recently made available to me, which information is compiled and disseminated by the Administrative Office of the Courts. These statistics reflect the total number of inmates in all County jails, with a breakdown between presentenced and sentenced inmates, and a further breakdown into those sentenced inmates who are under and over the 15 day limit. These statistics are attached as Exhibit E and consist of 17 sets of 2

pages each. They are compiled weekly by the Pretrial Services Unit of the Administrative Office of the Courts. The information is secured by the Administrative Office of the Courts calling each Tuesday for the actual counts on that day from representatives of each County jail. The Administrative Office of the Courts then mails out the completed sheets as attached to all County jails in the normal course of business.

11.) My analysis (Exhibit D) sets forth the available space for housing of state prison inmates from June 16 through August 25, 1981. It clearly indicates that during this period there has been available to the Commissioner of Corrections, by virtue of the Executive Order, between 368-449 beds for use of state prison inmates *and for the lessening of overcrowded County Jails.* The analysis clearly shows that during the period covered, had *all* the Union County Jail state prisoners exceeding 15 days been removed there would *still* have been over 300 additional beds statewide for other inmates.

12.) It is respectfully suggested that a clear inference to be drawn by this analysis is that the Commissioner of Corrections has failed to implement the Executive Order "to efficiently allocate inmates of state and county penal and correctional institutions to those institutions having available space in order to alleviate overcrowding. ."

13.) It is respectfully submitted that the situation at the Union County Jail continues to be volatile, highly charged and, unless emergent action is taken to remove *all* state prison inmates to reduce our population to at or below our rated capacity, the very real possibility of another riot continues to exist.

14.) The present mood at the jail is a combination of hostility and fear — hostility by the inmates because of the overcrowding, curtailment of privileges and inconveniences caused by both; and fear on the part of both inmates and County employees and administrators because of the very real potential of another uprising.

15.) It is respectfully submitted that only the immediate and continued removal of all qualifying state inmates from the Union County Jail can defuse the clear and present danger that now exists, and this affidavit is offered in support of that request for emergent relief.

WARREN R. MACCARELLI

Sworn to and Subscribed before
me this 15th day of October,
1981.

Stella Tomich
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAR. 27, 1983

Filed October 22, 1981.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, et al.,	:	
Plaintiffs,	:	
v.	:	Civil No.
V. WILLIAM DIBUONO, Assignment Judge, et al.,	:	81-863 (H.A.A.)
Defendants,	:	AFFIDAVIT
v.	:	
WILLIAM H. FAUVER, Commissioner, Department of Corrections,	:	
Third Party Defendants.	:	

STATE OF NEW JERSEY:
ss:
COUNTY OF UNION

ROBERT C. DOHERTY, of full age, being duly sworn according to law, upon his oath deposes and says:

1.) I am the County Counsel of the County of Union, attorney for the Defendants/Third Party Plaintiffs and an Attorney at Law of New Jersey.

2.) Under the State's Criminal Code there exists a certain statute, VIZ., N.J.S.A.2C:43-10(e) which, *inter alia* mandates that the Commissioner of Corrections *shall* accept all state prisoners from the appropriate County authority within 15 days after sentence.

3.) The forerunner of said statute was N.J.S.A.2A:164-18, the only difference being a 20 day

period instead of 15 days. That statute was judicially determined as mandatory by the Appellate Division of the New Jersey Superior Court in *Cryan v. Klein*, 148 N.J. Super. 27 (App. Div. 1977). Thus, as a matter of settled New Jersey Law the Commissioner cannot refuse to accept qualifying state prison inmates from a County facility.

4.) On June 19, 1981 Governor Byrne issued Executive Order 106, effective for 90 days (subsequently extended till January 20, 1982) which purported to suspend the mandatory effect of N.J.S.A.2C:43-10(e) and in furtherance thereof, the Commissioner by letter dated June 29, 1981, designated the Union County Jail as "the place of confinement for all persons currently sentenced by the Courts of Union County to the care and custody of the Commissioner" (see Exhibit A & B).

5.) Effectively that Order has prevented the removal from the County Jail of all state prisoners then sentenced and those subsequently sentenced to State Institutions, although from time to time minimal numbers have been accepted. This Order also effectively stayed the pending State Court litigation of *Albanese et al. v. Fauver*, Docket No. 1-45913-80EPW, seeking to Order the removal of all state inmates (Exhibit C).

6.) The validity of this Order was upheld by a divided vote in the Appellate Division, N.J. Superior Court, in the case of *Worthington et al. v. Fauver et al.*, N.J. Super. (App. Div. 9/4/81 — Docket No. A 4796-80T2). It is scheduled for argument before the New Jersey Supreme Court on October 19, 1981.

7.) By Consent Order entered in the within Federal Court action the County defendants have conceded that the constitutionally permitted long-term maximum population limit for the County Jail is 238 inmates. While that Order does provide some relief to the County, by virtue of authorizing the suspension of N.J.S.A.30:8-1 et

seq. based upon the theory that to exceed the maximum population limit would violate constitutional rights of the inmates, the County is still faced with the excess population of 50 or more "state inmates" who create the overcrowded situation. Unless relief is afforded thereon, in the nature of immediate removal of all qualifying state inmates from the Jail, the practical ability to comply with the Consent Order is almost nil.

8.) Until now it had been thought by County officials that there were no available beds for state prisoners anywhere in the State, thus preventing the Commissioner of Corrections from reducing our jail population.

9.) Recently, however, the statistics compiled by the A.O.C. and appended to Mr. Maccarelli's Affidavit have become available to the newly organized Division of Correctional Services and, as detailed in Mr. Maccarelli's Affidavit, clearly indicate a vast number of available beds, all under the Commissioner's jurisdiction to assign by virtue of the Executive Order. Immediate removal from the County Jail of all qualifying state prison inmates and assignment to those available bedspaces would have *minimal* effect on the Commissioner's statewide operation; it would not use all such beds but only a small percentage of *available* spaces that have been available since the issuance of the Executive Order. It would, however, have a substantial effect on Union County, thereby eliminating entirely, or very nearly so, the excess population over 238.

10.) The present and continuing emergent nature of the situation at the Union County Jail cries out for *immediate* resolution. Such a resolution is the immediate removal of all qualifying state prison inmates from the County Jail and their transportation to whatever facility

the Commissioner may direct by virtue of his authority under the Executive Order.

ROBERT C. DOHERTY

Sworn and Subscribed to
before me this 19th day
of October, 1981.

CAROLYN D. PALMER
A NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 6, 1986

A-139

Filed December 27, 1983.

SUPREME COURT OF THE UNITED STATES

No. A-500

UNION COUNTY JAIL INMATES, etc.
Petitioners,

v.

V. WILLIAM DIBUONO, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 18, 1984.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 27th
day of December, 1983

APPENDIX M

SEE COMPANION CASE